LIBRARY
SUPREME COURT U. S.

FILED
JUN 26 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD J. GRENIER, JR.
1200 Farragut Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

SUTHERLAND, ASBILL & BRENNAN
1200 Farragut Building
Washington, D. C. 20006

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
STATUTES INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	12
1. The Commission's Arbitrary Refusal To Consider Petitioner's Solemn Commitment To Dispose of Its Rochester Station, While Taking Into Consideration Other Post-Record Changes of Decisional Significance, Requires Reversal and Remand of the Case to the Commission	15
2. The Commission's Arbitrary Refusal To Consider the New Information Submitted by Petitioner in Response to the *Policy Statement*, Which Substantially Changed the Ground Rules Governing Comparative Broadcast Proceedings, Requires Reversal and Remand of the Case to the Commission	22
3. The Commission's Failure To Give a Rational Explanation of (1) Its Refusal To Consider Petitioner's Commitment To Divest, as Developed in the Preceding Two Points, and (2) Its Preference for Flower City Requires Reversal and Remand of the Case to the Commission	23
CONCLUSION	24
APPENDIX A	1a
APPENDIX B	24a
APPENDIX C	31a
Opinion of the Court Below	31a
Judgment	50a
APPENDIX D	51a
APPENDIX E	52a

INDEX TO CITATIONS

CASES:	Page
Acardi v. *Shaughnessy*, 347 U.S. 260 (1954)	23
Broadcasters, Inc., 29 F.C.C. 366, 19 R.R. 731 (1960)	20
Burlington Truck Lines, Inc. v. *U.S.*, 371 U.S. 156 (1962)	23
Channel Assignment in Rochester, New York, 21 R.R. 1748a (1961)	3
Community Television Corp., 32 F.C.C. 923, 24 R.R. 1 (1962)	20
Farragut Television Corp., 5 F.C.C. 2d 93, 8 R.R. 2d 552 (1966)	17
FCC v. *RCA Communications, Inc.*, 346 U.S. 86 (1953)	23
Flower City Television Corp., 9 F.C.C. 2d 249, 10 R.R. 2d 1059, *reconsideration denied*, 10 F.C.C. 2d 718, 11 R.R. 2d 771 (1967)	1-2, 7, 8, 9, 10, 11, 13, 16, 17, 18, 19, 20, 21, 23
Flower City Television Corp., 9 F.C.C. 2d 264 (1964) (Initial Decision)	2, 7
Hi-Line Broadcasting Co., 22 F.C.C. 891, 13 R.R. 1017 (1957)	19
ICC v. *Louisville & N. Ry.*, 227 U.S. 88 (1912)	21
Indianapolis Broadcasting, Inc., 22 F.C.C. 421, 12 R.R. 883 (1957)	17
Lewis Broadcasting Corp., 11 F.C.C. 2d 889, 12 R.R. 2d 627 (1968)	17
Phelps Dodge Corp. v. *Labor Board*, 313 U.S. 177 (1941)	23
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393, 5 R.R. 2d 1901 (1965)	6, 8, 14, 17, 22, 23
Red Lion Broadcasting Co. v. *FCC*, 37 U.S.L. Week 4509 (June 9, 1969)	15
Report of Changed Circumstances, 3 R.R. 2d 1622 (1964)	21
SEC v. *Chenery Corp.*, 318 U.S. 80 (1943)	23
Service v. *Dulles*, 354 U.S. 363 (1957)	23
Scenic Hudson Preservation Conference v. *FPC*, 354 F. 2d 608 (2d Cir. 1965)	21
Siegel Co. v. *FTC*, 327 U.S. 608 (1946)	23

Page

St. Louis Telecast, Inc., 22 F.C.C. 625, 12 R.R. 1289 (1957) 19
Television Broadcasters, 27 F.C.C. 727, 17 R.R. 1169 (1959) 17
Travelers Broadcasting Serv. Corp., 21 F.C.C. 110, 12 R.R. 689 (1956) 19
Vitarelli v. *Seaton*, 359 U.S. 535 (1959) 23
WHDH, Inc., 33 F.C.C. 449, 24 R.R. 255 (1962) 17-18
WHDH, Inc., 16 F.C.C. 2d 1, 15 R.R. 2d 411, *reconsideration denied*, 16 R.R. 2d 185 (1969) 14, 16, 17-18
WHEC, Inc., 24 F.C.C. 147, 14 R.R. 150, *aff'd*, 106 U.S. App. D.C. 162, 270 F. 2d 914 (1959), *cert. denied*, 362 U.S. 935 (1960) 17

STATUTES AND REGULATIONS:

Communications Act of 1934 3
47 U.S.C. § 402(b) 15
28 U.S.C. § 1254(1) 2
47 C.F.R. § 1.65 21

OTHER:

FCC Public Notice, Report No. 8571 (June 4, 1969) ... 15
Fisher, *The President's Comment*, 21 Fed. Com. B.J. 117 (1967) 13
Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055 (Part 2, 1962) 13-14
Friendly, *The Federal Administrative Agency* (1962) 21
Grunewald, *Should the Comparative Hearing Process Be Retained in Television Licensing*, 13 Amer. U.L. Rev. 164 (1964) 13
Landis, *Report on Regulatory Agencies to the President-Elect*, Subcommittee on Administrative Practice and Procedure of Senate Committee on Judiciary, 86th Cong., 2d Sess., p. 53 (Committee Print 1960) 14

Page

Landis, *The Administrative Process* (1938) 21

Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961) 14

ORDERS OF THE FEDERAL COMMUNICATIONS COMMISSION:

FCC 61-1511, released January 2, 1962 4

FCC 62-385, released April 13, 1962 4

FCC 65-403, released May 13, 1965 5

FCC 66-347, released April 21, 1966 7

FCC 67-518, released April 28, 1967 .....7, 20, 22

Prettyman, *Trial by Agency* (1959) 16, 21

Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959) 14

Wilcox, *Public Policies Toward Business* (1960) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner The Federal Broadcasting System, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on January 30, 1969.

OPINIONS BELOW

The Decision of the Federal Communications Commission (FCC 67-924), released August 3, 1967, upheld by the Court below, is reported at 9 F.C.C.2d 249

and 10 R.R.2d 1059,[1] and is printed in Appendix A, *infra*. The Memorandum Opinion and Order of the Federal Communications Commission (FCC 67-1276), released November 29, 1967, denying reconsideration, is reported at 10 F.C.C.2d 718, 11 R.R.2d 771, and is printed in Appendix B, *infra*. The Opinion of the panel of the Court of Appeals is not as yet reported and is printed in Appendix C, *infra*. The Order of the Court of Appeals denying rehearing by the panel and the letter from the Clerk of the Court of Appeals indicating that appellants' suggestion that the case be reheard *en banc* was not accepted by the Court are not reported and are printed in Appendix D, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 1969 (App. C, p. 50a, *infra*). Petitioner filed a timely petition for rehearing on February 12, 1969. The Court of Appeals denied the petitions for rehearing filed by petitioner and the other appellants below on April 1, 1969.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

---

[1] Citations to "R.R." or "R.R.2d" are to volumes of Pike & Fischer Radio Regulation. The Initial Decision rendered by a hearing examiner of the Federal Communications Commission (FCC 64D-5), released January 28, 1964, is reported at 9 F.C.C.2d 264 and is included in Volume 1 of the Joint Appendix in the Court of Appeals, which has been filed in this Court.

[2] Petitioner understands that several of the appellants in the court below intend to file a consolidated petition for certiorari. Petitioner assumes that, although it herein raises certain issues particularly applicable to it, this petition will be considered along with that consolidated petition.

QUESTION PRESENTED

Whether, in a comparative licensing proceeding, after declaring its intention to decide the case without further hearings "on the basis of the facts as they now exist" rather than solely on the basis of an admittedly stale record nearly five years old, an administrative agency may (1) arbitrarily limit its consideration to certain post-record factual changes and refuse to take into account other post-record changes of obvious decisional significance and (2) utterly fail to comply with its fundamental obligation of making adequate findings and furnishing a meaningful statement of reasons supporting its choice among the several competing applicants.

STATUTES INVOLVED

The provisions of the Communications Act of 1934 principally involved are set forth in Appendix E, *infra*.

STATEMENT

In pursuit of its goal to establish a nationwide competitive commercial television service with comparable outlets in the major markets for each of the three national television networks, the Commission in 1961 added Channel 13 as the third VHF channel in Rochester.[3] *Channel Assignment in Rochester, New York,* 21 R.R. 1748a (1961). Twelve applicants promptly filed applications for the channel, including the Rochester Area Educational Television Association, Inc. (RAETA), a nonprofit corporation organized to

[3] The Commission has reserved for television broadcasting 12 VHF (very high frequency) channels (2-13) and 70 ultra-high frequency (UHF) channels (14-83).

produce and present educational programs. RAETA and a regular commercial applicant submitted a single share-time proposal, under which RAETA would operate the proposed station as an educational station for part of each day and the commercial applicant would operate it as a regular commercial station for the remainder of the day. The remaining applicants, including petitioner, filed applications for a regular commercial operation to be affiliated with the ABC Television Network.

In early 1962, the Commission designated the competing applications for hearing on certain stated issues, including the all-important comparative issue, which read as follows:[4]

> "To determine on a comparative basis which of the mutually exclusive operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in light of the significant differences among the applicants as to:
>
> (a) The background and experience of each bearing on its ability to own and operate the proposed television broadcast station.
>
> (b) The proposals of each with respect to the management and operation of the proposed television station.
>
> (c) The programming service proposed in each of the above-captioned applications.
>
> (d) The programming service proposed in each of the applications considered in light of the following factors:

[4] The original designation order was released on January 2, 1962 (FCC 61-1511), and the comparative issue was modified by the addition of subparagraphs (c) and (d) in an order released on April 13, 1962 (FCC 62-385).

(1) Whether there are particular types or classes of programs for which there is an unfulfilled need in the area proposed to be served.

(2) The extent to which the program proposal of each applicant would meet such needs."

The hearing was held on several dates during 1962, and the record was closed in December, 1962. The process of filing proposed findings of fact and conclusions was completed on May 20, 1963. Eight months later, on January 28, 1964, the examiner issued her initial decision proposing to grant the share-time proposal by RAETA and Rochester Telecasters, Inc. (RTI) on the ground that there was an overriding need in the Rochester area for educational programs. In view of this basic determination, she saw no need to rank or evaluate the other applicants vis-a-vis each other under the Commission's comparative criteria. Exceptions to the initial decision and briefs in support thereof were filed with the Commission in April, 1964, and the Commission held oral arguments in the case on November 2, 1964.

Six months later, on May 13, 1965, the Commission reopened the record and ordered a further hearing on the key questions of (1) whether alternative means were available for the broadcast of the type of educational programming proposed by RAETA and (2) whether a share-time applicant such as RTI would provide an effective competitive outlet for a third major television network (FCC 65-403). The remand order also stated that the hearing would include other issues regarding the qualifications of the principals of the various applicants, planning and preparation, etc. The Commission ordered the applicants to bring their applications up to date within 90 days to reflect involun-

tary changes, such as those resulting from the death or disability of principals and also to revise their programming plans in accordance with any reassessment they might make of community needs in Rochester.

Shortly after the Commission issued its remand order, two significant events occurred. First, on July 28, 1965, the Commission promulgated its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C.2d 393, 5 R.R.2d 1901 (hereinafter *"Policy Statement"*).

In this *Policy Statement* the Commission restated and, in some very important respects, revised the criteria it would apply in comparative broadcast cases. In contrast with past practice, the comparative factor "diversification of control of the media of mass communications" (hereinafter called "diversification factor") was elevated to the primary position among the decisional factors in comparative broadcast cases because, in the words of the Commission, diversification "constitutes a primary objective in the licensing scheme." The comparative factor "full-time participation in station operation by owners," or integration of ownership and management, as it was known before the *Policy Statement* (hereinafter sometimes referred to as the "integration factor"), while of "substantial importance," was ranked second to the diversification factor and was treated as but one of several factors pertinent to the other primary objective in the licensing scheme, namely, provision of the best practicable service to the public. As shown below, the significance of the changes wrought by the *Policy Statement* was made manifest in certain cases decided after the issuance of the *Statement.* The Commission specifically stated in the *Policy Statement* that the *Statement would be applied in deciding pending cases.*

The second event of major significance was the voluntary dismissal of RAETA's application in January, 1966. With the funds obtained from the other applicants (except RTI) in reimbursement of its hearing expenses, RAETA eventually constructed a noncommercial educational television station on a UHF channel (Channel 21) reserved for educational use (Decision, ¶ 2).[5] The dismissal of the RAETA application removed from the case the applicant which the examiner had used as the standard against which the other applicants were measured, and it also completely eliminated the basis for the examiner's Initial Decision.

On April 21, 1966—nearly a year after its remand order—the Commission, stating it was acting because of the changed circumstances, cancelled the further hearing and rejected the amendments that it had invited from the applicants following their reassessment of community needs (FCC 66-347).

The Commission took no further action in the case until more than a year later. Finally, in response to certain pleadings filed by various applicants urging the Commission to resolve the case either in a manner which would encourage a merger among certain of the applicants or in the customary way of selecting a single winner, the Commission released an order on April 28, 1967, calling for further oral arguments on May 22, 1967 (FCC 67-518). The order recited that "a number of events have occurred since that date [November 2, 1964, date of the first oral argument] which may have a bearing upon the determination to be made herein." The second oral argument was expressly intended to

---

[5] All references to the Commission's final decision are shown as "Decision, ¶ ——." The entire Decision is printed below in Appendix A.

permit the parties "to address themselves to the remaining issues in this proceeding."

At the oral argument on May 22, 1967, the then counsel for petitioner responded to the Commission's invitation to address himself to the "remaining issues in this proceeding." Undoubtedly the most important "remaining issue" was the application of the *Policy Statement* in resolving the case. In view of the striking change wrought by the *Statement* in the importance and application of the diversification factor, counsel made the following solemn commitment on behalf of petitioner:

> "He [Gordon P. Brown, petitioner's sole stockholder] has a station in Rochester, and specifically if there is an objection to the station that can be cured. *He volunteers and agrees specifically to dispose of that station.*" (Emphasis supplied.) (T. 9931).[6]

The reference was to petitioner's standard broadcast station, WSAY, Rochester, New York, and the promise was repeated a bit later in the oral argument (T. 9933). Neither the Commission nor counsel for the other applicants objected to the propriety of petitioner's making that commitment at that time in response to the changed circumstances brought about by the issuance of the *Policy Statement*.

The Commission released its Decision on August 3, 1967. Only five of the seven Commissioners participated,[7] and they split 3-2 with dissenting Commissioner

---

[6] References to the transcript of the proceedings before the Commission are shown "(T. —)." The transcripts of proceedings of the 1964 and 1967 oral arguments before the Commission are included in Volume 8 of the Joint Appendix in the Court below, which has been filed in this Court.

[7] Commissioner Cox was shown as "not participating" and Commissioner Wadsworth as "absent."

Bartley voting for petitioner and dissenting Commissioner Johnson expressing a preference for Community Broadcasting, Inc. Since petitioner proposed 100% integration of ownership with management, and since such participation would be by a long-term local resident with many years of broadcast experience, the Commission gave petitioner a substantial preference over all of the other applicants on the integration factor (Decision, ¶ 8). However, the Commission gave each of the other applicants an equal preference over petitioner on the "very important" diversification factor because of petitioner's existing AM broadcast station (WSAY) in Rochester.[8]

To justify this conclusion the Commission stated that "[w]hile the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of these applicants would provide a new voice in the Rochester area" (Decision, ¶ 7).

The Commission ranked the winning applicant, Flower City Television Corporation ("Flower City"), second under the integration factor (Decision, ¶ 8), but Flower City was chosen over petitioner solely because of petitioner's existing Rochester broadcast sta-

[8] Gordon P. Brown, petitioner's sole stockholder, is also licensee of radio station WNIA in Cheektowaga, New York, about 70 miles west of Rochester. His ownership of that station, without WSAY, would not have been of decisional significance under the circumstances of the case. (See Decision, ¶ 7 and nn. 8, 9.) In any event, as noted below, Mr. Brown offered to dispose of WNIA if required by the Commission upon grant of a construction permit for Channel 13.

tion (WSAY) (Decision, ¶¶ 7, 13).[9] Thus, despite the Commission's stated intention to decide the case "on the basis of the facts as they now exist" (Decision, ¶ 6(e)), the Commission totally ignored petitioner's solemn promise to divest itself of its Rochester radio station. On the other hand, the Commission *did* take into consideration in its Decision certain changes affecting other parties, which occurred after the evidentiary record was closed. (See Decision, ¶ 6.) Most strikingly, the Commission gave full consideration to the post-record disposition of certain broadcast interests (including stations in Rochester itself) by certain principals in Star Television, Inc. ("Star") in ranking Star equal to all of the other applicants, except peti-

---

[9] "We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15% stockholder (and proposed general manager) who was a 50% owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower." (Decision, ¶ 13).

tioner, with respect to the diversification factor (Decision, ¶¶ 6(b), 7).

Since the Commission rested its decision squarely upon Flower City's second best preference under the integration factor,[10] *it is clear that petitioner would have prevailed before the Commission but for the Commission's unwarranted and unexplained refusal to consider petitioner's commitment to dispose of its radio station.*

On September 5, 1967, petitioner and all but one of the other losing applicants filed timely petitions for reconsideration by the Commission.[11] On page 9 of its petition for reconsideration, petitioner stated formally that Mr. Brown was willing to dispose of his Cheektowaga station as well as WSAY "if requested by the Commission on the grant to it [petitioner] of Channel 13."[12] The Commission's Memorandum Opinion and Order released November 29, 1967, denying reconsideration, failed to consider, or even mention, petitioner's solem commitment to dispose of its radio stations. The Commission voted 4-2 to deny reconsideration, with Commissioner Bartley dissenting and stating once again that he would grant petitioner's application, Commissioner Johnson dissenting without further comment, and Commissioner Cox not participating.

---

[10] No other comparative factor was of decisive significance in the Commission's choice of Flower City.

[11] Included in Volume 9 of the Joint Appendix in the Court below, which has been filed in this Court.

[12] By an amendment tendered for filing with the Federal Communications Commission on March 8, 1968, petitioner and its sole stockholder again asserted that they "will" dispose of Radio Stations WSAY and WNIA upon a grant of petitioner's television application.

On December 29, 1967, petitioner and all but one of the other losing applicants appealed to the Court below.[13] In the joint brief filed by petitioner and the other losing applicants in the Court below, petitioner contended that the Commission had improperly failed to consider its contentions regarding diversification of control of the mass media of communications, including its promise to dispose of its existing stations (Brief for Appellants, pp. 71-73). In its opinion affirming the Commission, issued on January 30, 1969, the Court below made no specific reference to that argument. Although Judge Leventhal, in his dissenting opinion, did not focus on this point, he was deeply concerned with the Commission's conduct of the proceeding. He concluded that "the findings fail to support the [Commission's] order in that the Commission failed to set forth its reasons for preferring Flower" and that "sound principles of administrative law and judicial review require remand to the Commission" (App. C, p. 37a, *infra*).

REASONS FOR GRANTING THE WRIT

This case poses questions of vital importance in the field of administrative law generally and, more particularly, in the selection of television and radio broadcasters in comparative broadcast proceedings—questions relating to the basic integrity of the process by which the Federal Communications Commission selects among competing applicants for broadcast facilities. The decision below allows that process to become simply an exercise of administrative fiat.

---

[13] Star Television, Inc., had filed its appeal in the court below on September 5, 1967, in lieu of filing a petition for reconsideration with the Commission.

Petitioner was, by the Commission's own Decision, far superior to all of the other applicants on the very important integration factor. Yet, the Commission preferred another applicant considerably inferior to petitioner on this factor solely because of petitioner's existing ownership of an AM radio station in Rochester. In arbitrarily refusing to consider petitioner's solemn commitment to dispose of that station, while at the same time considering other post-record changes of decisional significance, the Commission has raised a fundamental issue concerning the validity and rationality of the process by which it selects among competing applicants for broadcast facilities. Judge Leventhal stated the basic question with great precision:

> "... Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants?" (App. C., p. 47a, *infra*).

Thus this case poses the fundamental issue of whether the comparative hearing process—as conducted not only by the Federal Communications Commission, but by the other federal agencies as well—can be a truly rational process. If the Commission's action in the instant case is allowed to stand, a major step away from rationality in the comparative hearing process will have been sanctioned.[14]

---

[14] Students of the hearing process have frequently criticized the FCC's failure to achieve rationality in the broadcast comparative hearing process and have offered suggestions for improvements or substitutions for the process itself. See, *e.g.*, Fisher, *The President's Comment*, 21 Fed. Com. B.J. 115 (1967); Grunewald, *Should the Comparative Hearing Process Be Retained in Television Licensing?*, 13 Amer. U.L. Rev. 164 (1964); Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Stand-*

The fundamental issues presented in this case are of very timely concern in the field of comparative broadcast hearings themselves. In a departure from past policy, the full scope of which will undoubtedly unfold in the not too distant future, the Commission recently ruled that it would give unqualified application to its *Policy Statement* in comparative hearings in which one of the competing applicants is seeking renewal of an existing license. *WHDH, Inc.*, 16 F.C.C. 2d 1, 15 R.R.2d 411, *reconsideration denied*, 16 R.R.2d 185 (1969).[15] In the *WHDH* case the Commission for the first time refused to renew a broadcast license and instead awarded the facility to another applicant on solely comparative (as distinguished from disqualifying) grounds. Since the *WHDH* decision, there have been quite a few instances of filings on top of existing

---

ards, 75 Harv. L. Rev. 1055, 1070-72 (Part 2, 1962); Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961); Landis, *Report on Regulatory Agencies to the President-Elect*, Subcommittee on Administrative Practice and Procedure of Senate Committee on Judiciary, 86th Cong., 2d Sess., p. 53 (Committee Print 1960); Wilcox, *Public Policies Toward Business* 710 (1960); Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655, 695 (1959). Judge Leventhal himself suggested in his thoughtful dissenting opinion in the court below:

> "Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmissible means of deciding the undecidable, provided the ground rules are known in advance." (Footnote omitted.). (App. C., pp. 47a-48a, *infra*).

[15] The Commission had expressly stated in its *Policy Statement* that the *Statement* does not attempt to deal with the somewhat different problems raised where an applicant contests with an existing licensee seeking renewal of his license. *Policy Statement*, 1 F.C.C.2d 393, 5 R.R.2d 1901, n. 1 (1965).

licensees seeking renewal of their licenses.[16] Thus, the era of the major broadcast comparative case is still here, and the Commission, like the other federal agencies, will continue to perform as one of its key duties the selection of grantees in comparative hearing proceedings. Indeed, this Court very recently observed that "[c]omparative hearings between competing applicants for broadcast spectrum space are by no means a thing of the past." *Red Lion Broadcasting Co. v. FCC*, 37 U.S.L. Week 4509, 4518 (June 9, 1969). The departure by the Federal Communications Commission in the case at bar from the accepted and required course of procedure in comparative administrative proceedings, as outlined below, thus requires immediate correction by this Court. Rule 19(b).[17]

1. The Commission's Arbitrary Refusal To Consider Petitioner's Solemn Commitment To Dispose of Its Rochester Station, While Taking Into Consideration Other Post-Record Changes of Decisional Significance, Requires Reversal and Remand of the Case to the Commission.

The Commission's arbitrary refusal to take into consideration petitioner's solemn commitment to dispose of its Rochester station and its failure to support its choice of Flower City on a rational basis show that the administrative process suffered a substantial breakdown

[16] For example, competing applications have been filed against renewal applicants for Channel 4 in Los Angeles, California; Channel 7 in Boston, Massachusetts; and Channel 3 in Jackson, Mississippi. In addition, a new applicant very recently tendered for filing with the Commission an application competing with the present licensee of station WPIX, Channel 11, New York, New York, FCC Public Notice, Report No. 8571, p. 4 (June 4, 1969).

[17] Since jurisdiction to appeal from an order of the FCC in broadcast application cases lies only in the United States Court of Appeals for the District of Columbia Circuit, 47 U.S.C. § 402(b), there can be no question of a conflict between circuits in this case.

in the case at bar.[18] As noted, the Commission preferred Flower City to petitioner solely because of petitioner's AM radio station in Rochester. In the Commission's view, providing a new broadcast voice in Rochester is more important than the greater ownership participation in management which would be provided by petitioner (Decision, ¶ 13).[19] This has not al-

---

[18] In this case, the Commission certainly ignored the fundamental axiom enunciated by Judge Prettyman:

> "The function of an administrative agency is the administration of law—no more, no less. It has no other function. It has no other power. It has no other duty. It is circumscribed, restricted, bound by that proposition. Its every policy should be selected by that test and that test only. The validity of its every action should be measured by that standard. When it makes rules, which are laws, it should abide the requirements of the law for lawmaking. When it makes orders, which are decrees, it should abide the requirements of the law for adjudication. All else in the way of guides or standards or measurements ought to be discarded, forgotten, avoided, put away, save only the simple idiom that the sole function of an agency is to administer law." Prettyman, *Trial By Agency* 10,11 (1959),

[19] The Commission majority rather woodenly assumed that the introduction of a so-called "new voice" in Rochester would promote its policy of fostering "the widest possible dissemination of information from diverse and antagonistic sources" (WHDH, Inc., 15 R.R.2d 411, 426 (1969)). In so doing, it completely ignored the quality of the "voices" involved, as pointed out by dissenting Commissioner Bartley:

> "The majority here states that the preferences to the other applicants 'must be considered substantial in this proceeding because each of those applicants would provide a "new voice" in the Rochester area.' I disagree. I believe that more basic than the matter of a 'new voice' is the quality of the 'voice' that is added to the area." (App. A, p. 20a, *infra*).

The Commission wholly ignored petitioner's demonstrated record of opposition to the "establishment" and the existing newspaper monopoly in Rochester (T. 9932), a position which petitioner had asserted with great vigor and consistency throughout the case. Petitioner's long opposition to the monopolistic newspaper establishment in Rochester is amply documented in the history of the

ways been the Commission's view. Prior to the issuance of its *Policy Statement* in 1965,[20] and certainly up to the close of the hearing record in December 1962, the Commission gave far less prominence to the diversification factor in comparative broadcast cases than it has in recent years. Indeed, following the issuance of the *Policy Statement,* the diversification factor has been placed in the primary position in comparative cases.[21]

Rochester Channel 10 case. WHEC, Inc., 24 F.C.C. 147, 14 R.R. 150, *aff'd,* 106 U.S. App. D.C. 162, 270 F. 2d 914 (1959), *cert. denied,* 362 U.S. 935 (1960).

The Commission also ignored the fact that, by accepting petitioner's commitment to divest its radio station WSAY, it could add a "new voice" to Rochester as the new licensee of WSAY. The Commission has ample power to assure that petitioner assign its license for WSAY to someone not now engaged in the mass media of communications in Rochester.

[20] The Commission applied its *Policy Statement* in deciding the instant case (Decision, ¶ 3).

[21] *Compare* Indianapolis Broadcasting, Inc., 22 F.C.C. 421, 12 R.R. 883 (1957); WHEC, Inc., *supra;* Television Broadcasters, 27 F.C.C. 727, 17 R.R. 1169 (1959), *with* the *Policy Statement,* ¶ 1; Farragut Television Corp., 5 F.C.C. 93, 8 R.R.2d 552 (1966); Lewis Broadcasting Corp. 11 F.C.C.2d 889, 12 R.R.2d 627 (1968). The marked change in the Commission's attitude toward the significance of the diversification factor in comparative cases following the issuance of its *Policy Statement* is graphically illustrated in the two WHDH cases. In the first case, the Commission said:

> "However, the ultimate significance of this preference is diluted by the presence in the community of very extensive numbers of newspapers, as well as AM, FM and television stations unassociated with the applicants. The Commission's policy of fostering diversified ownership of mass media of communication stems from the belief that the widest possible dissemination of information from diverse and competing sources best serves the public interest. Manifestly, the weight to be accorded this policy in any given case must take into account the competitive situation existing in the community involved. Where, as here, the proposal is for a community already served by numerous diversely owned outlets of expression, a grant to an entity controlling a minor fraction of such outlets has less tendency to bring about the concentra-

In view of the state of the law at the time the comparative hearing was held, petitioner could reasonably expect that its strong preference on the integration factor[22] would completely outweigh and neutralize

---

tion of media control which the Commission's diversification policy is designed to avoid. Therefore, although Greater Boston is entitled to a substantial preference on the diversification criteria, the decisional impact of that preference is far less than it might be if the competing applications were for a community possessing fewer existing media." WHDH, Inc., 33 F.C.C. 449, 453, 24 R.R. 255, 260 (1962).

In striking contrast is the Commission's statement in the recent second *WHDH* case:

> "As noted in the Policy Statement, diversification is a factor of first significance since it constitutes a primary objective in the Commission's licensing scheme. The benefits derived from diversification have been set forth in many cases decided by the courts and by the Commission, and they need not be recited in detail here. When compared with Charles River and BBI, WHDH manifestly ranks a poor third because of its ownership of a powerful standard broadcast station, an FM station, and a newspaper in the city of Boston itself. While it is true that the existence of numerous other media in Boston in which WHDH has no ownership interest may not be ignored and does somewhat diminish the weight to be accorded the preferences to Charles River and BBI on local diversification, nonetheless those preferences are quite significant here. *A grant to either Charles River or BBI would clearly result in a maximum diffusion of control of the media of mass communications as compared with a grant of the renewal application of WHDH. A new voice would be brought to the Boston community as compared with continuing the service of WHDH-TV. We believe that the widest possible dissemination of information from diverse and antagonistic sources is in the public interest, and this principle will be significantly advanced by a grant of either the Charles River or the BBI application.*" (Emphasis supplied.) (Footnote omitted.) 15 R.R.2d at 426-27.

[22] The Commission itself acknowledged that, in petitioner's case, participation in full-time station operation would be by petitioner's sole stockholder, "a long-time local resident with many years of radio experience" (Decision, ¶ 8).

whatever slight chilling effect its existing broadcast interests might have had upon its prospects, especially in view of the fact that there were so many broadcast stations already licensed to Rochester.[23] Petitioner recognized that a significant change in Commission policy had occurred since the close of the evidentiary record and, accordingly, at the first practicable opportunity in the regular course of the case,[24] it made a solemn commitment to divest itself of Station WSAY upon grant of a construction permit for Channel 13.[25]

Indeed, in making this commitment, petitioner was responding to the Commission's express invitation to

[23] At the time Commissioner Bartley wrote his dissent in the case at bar, there were 16 broadcast stations licensed in Rochester (Commissioner Bartley's dissenting opinion, App. p. 20a, *infra*). In Travelers Broadcasting Serv. Corp., 21 F.C.C. 110, 12 R.R. 689 (1956), the Commission awarded a television permit to an applicant with a local AM-FM interest, suggesting that there was "no pronounced tendency toward concentration of control of communications media locally," 21 F.C.C. at 215, 12 R.R. at 806d. See also St. Louis Telecast, Inc., 22 F.C.C. 625, 12 R.R. 1289, 1389-90 (1957), where the Commission awarded a license to an applicant with substantial local communications interests, and Hi-Line Broadcasting Co., 22 F.C.C. 891, 13 R.R. 1017 (1957).

[24] Since, as noted, the Commission withdrew its remand of the proceeding and never reopened the hearing record, the oral argument held on May 22, 1967, before the Commission *en banc*, was the first opportunity in the normal course of the proceeding for petitioner to make this commitment.

[25] The ownership of Station WNIA in Cheektowaga, New York, by petitioner's sole stockholder is not material with respect to the diversification factor. Cheektowaga is about 70 miles from Rochester, and it is clear from the Commission's Decision that, without Station WSAY, petitioner would have stood on about an equal footing with the other applicants vis-a-vis the diversification factor. (See Decision, ¶ 7 and nn. 8, 9.) In any event, in its petition for reconsideration filed with the Commission, petitioner expressed the willingness of its sole stockholder to dispose of Station WNIA upon grant of petitioner's application.

the parties in its order of April 28, 1967 (FCC 67-518) "to address themselves to the remaining issues in this proceeding". The 1967 oral argument was plainly intended by the Commission to dispose of matters which arose since the closing of the hearing record.[26] Petitioner accepted the Commission's invitation—and neither the Commission nor any of the other parties raised any objection to petitioner's making its commitment to divest at that stage of the proceeding.[27] Petitioner, under the circumstances, had a right to expect that its commitment would be honored, since the Commission has long relied upon and accepted commitments to divest interests in existing broadcast facilities upon the grant of pending broadcast applications, and it has done so in comparative hearing situations. See, *e.g., Community Television Corp.*, 32 F.C.C. 923, 24 R.R. 1 (1962); *Broadcasters Inc.*, 29 F.C.C. 366, 19 R.R. 731 (1960).

Irrespective of the timeliness of petitioner's commitment to divest, the Commission's total disregard of petitioner's solemn commitment to divest in both its Decision and order denying reconsideration was arbitrary and unjust, since it did take into account certain other events which occurred after the close of the evi-

---

[26] For example, the Commisison considered RTI's pending motion for leave to amend its applieation so as to specify full-time operation.

[27] In their briefs filed in the court below, both Flower City and the Commission belatedly objected to petitioner's making its commitment to divest at the 1967 oral argument. Rather than being a mere untimely attempt to improve its comparative position, as contended by Flower City and the Commission, petitioner's commitment at the oral argument was a timely effort, in the context of the entire proceeding, to join with the other parties in addressing themselves to "the remaining issues in this proceeding."

dentiary record. (See Decision, ¶ 6.) For example, in ranking Star equal to all of the other applicants, except petitioner, with respect to the diversification factor, the Commission plainly relied upon the post-record disposition of various broadcast interests (including some in Rochester itself) by various principals of Star. (Decision, ¶¶ 6(b), 7).[28]

It is the obligation of an administrative body to decide a case on the basis of all facts properly before it. The Commission may not rely solely on those facts which support the ultimate result it desires, whether such facts are contained in the record or offered and received after the close of the record. To pick and choose arbitrarily among post-record facts, as the Commission did here, is contrary to law and destructive of the administrative process. See, *e.g.*, *ICC* v. *Louisville & N. Ry.*, 227 U.S. 88, 93 (1912); *Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608 (2d Cir. 1965), and cases cited therein; Friendly, *The Federal Administrative Agency* 144 (1962); Landis, *The Administrative Process* 36-46 (1938).[29]

---

[28] The Commission's statement in its Decision (¶ 6(e)) that it desired to decide the case "on the basis of the facts as they now exist" is in accord with long-standing Commission policy to insure that its public interest determinations are based on up-to-date facts. See Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65; Report of Changed Circumstances, 3 R.R.2d 1622 (1964).

[29] See also Prettyman, Trial By Agency 7-8 (1959). Judge Prettyman precisely defined the limits of administrative discretion, as follows:

> "We often hear of administrative discretion. There is such a thing. But administrative discretion is no broader or stronger in its field than is judicial discretion in its field, or legislative discretion in its field, or executive discretion in its field." *Id.* at 8.

2. The Commission's Arbitrary Refusal To Consider the New Information Submitted by Petitioner in Response to the Policy Statement, Which Substantially Changed the Ground Rules Governing Comparative Broadcast Proceedings, Requires Reversal and Remand of the Case to the Commission.

Petitioner does not suggest that the Commission could not issue its 1965 *Policy Statement* and then apply it to the case at bar. However, petitioner does contend that the Commission cannot have its cake and eat it. In the course of a proceeding, the Commission cannot change the rules of the game, as it did in issuing the *Policy Statement,* especially with regard to the very important diversification factor, and then refuse to permit the parties to address themselves in a meaningful way to the new issues occasioned by the issuance of such *Statement.* The Commission should either have allowed its remand order to stand and thus have held further evidentiary hearings, followed by the issuance of a new initial decision,[30] or it should have devised some other procedure which would have enabled the Commission to decide the case with all pertinent information before it. As noted, the Commission supposedly chose the latter course in its order of April 28, 1967 (FCC 67-518) scheduling further oral argument on May 22, 1967. Having made its choice, the Commission could not refuse to consider the new information submitted by petitioner in reaction to the new view of the diversification factor expressed

[30] The staleness and insufficiency of the examiner's initial decision in the case at bar, which was issued prior to the Commission's 1965 *Policy Statement,* was further aggravated by the dismissal of RAETA's application in 1966. Such dismissal completely destroyed the foundation of the examiner's initial decision and made such decision useless as a vehicle for bringing before the Commission meaningful exceptions based on the current factual situation.

in the *Policy Statement* and subsequent cases. For the Commission totally to ignore facts relevant under its new *Policy Statement,* as it did with respect to petitioner's solemn promise to divest, is an unreasonable and unexplained departure from its declared intention to apply the *Policy Statement* in deciding the case at bar. Because of this unwarranted departure from the Commission's own declared procedures for resolving the case, under prior decisions of this Court the judgment below should be reversed and the case remanded to the Commission for further proceedings. *Vitarelli* v. *Seaton,* 359 U.S. 535 (1959); *Service* v. *Dulles,* 354 U.S. 363 (1957); *Acardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *SEC* v. *Chenery Corp.,* 318 U.S. 80, 87-88 (1943).

3. The Commission's Failure To Give a Rational Explanation of (1) Its Refusal To Consider Petitioner's Commitment To Divest, as Developed in the Preceding Two Points, and (2) Its Preference for Flower City Requires Reversal and Remand of the Case to the Commission.

At minimum, petitioner was entitled to a rational explanation by the Commission of its refusal to consider petitioner's commitment to divest while at the same time considering other post-record changes of decisional significance. Nowhere in either the Commission's Decision or order denying reconsideration can such an explanation be found. The Commission's failure to give such explanation and to set forth its reasons for preferring Flower City entitles petitioner to summary reversal and remand to the Commission for further proceedings. *Burlington Truck Lines, Inc.* v. *U. S.,* 371 U.S. 156, 167-168 (1962); *FCC* v. *RCA Communications, Inc.,* 346 U.S. 86, 90 (1953); *Seigel Co.* v. *FTC,* 327 U.S. 608, 613-14 (1946); *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 197 (1941).

CONCLUSION

For the reasons stated above, the writ of certiorari should issue. The decision below should be reversed summarily and the case remanded with directions that the Commission reconsider its decision in light of petitioner's commitment to dispose of its existing broadcast interests.

Respectfully submitted,

EDWARD J. GRENIER, JR.
Counsel for Petitioner

SUTHERLAND, ASBILL & BRENNAN
Of Counsel

APPENDIX A

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14394 File No. BPCT-2929
GENESEE VALLEY TELEVISION CO., INC., ROCHESTER, N.Y. STAR TELEVISION, INC., ROCHESTER, N.Y.	Docket No. 14395 File No. BPCT-2944
COMMUNITY BROADCASTING, INC., ROCHESTER, N.Y.	Docket No. 14460 File No. BPCT-2948
HERITAGE RADIO & TELEVISION BROADCASTING CO., INC., ROCHESTER, N.Y. MAIN BROADCAST CO., INC., ROCHESTER, N.Y.	Docket No. 14461 File No. BPCT-2953
THE FEDERAL BROADCASTING SYSTEM, INC., ROCHESTER, N.Y. CITIZENS TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14462 File No. BPCT-2961
ROCHESTER BROADCASTING CORP., ROCHESTER, N.Y.	Docket No. 14464 File No. BPCT-2964
ROCHESTER TELECASTERS, INC., ROCHESTER, N.Y.	Docket No. 14465 File No. BPCT-2966
For Construction Permits for New Television Broadcast Stations (Channel 13)	Docket No. 14466 File No. BPCT-2967 Docket No. 14467 File No. BPCT-2972 Docket No. 14468 File No. BPCT-2974

Decision

(Adopted August 3, 1967)

BY COMMISSIONER LEE FOR THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER WADSWORTH ABSENT.

I. INTRODUCTION

1. The initial decision of Hearing Examiner Annie Neal Huntting (FCC 64D-5, released Jan. 28, 1964) recommended grant of the applications of Rochester Area Educational Television Association, Inc. (RAETA), and Rochester Telecasters, Inc. (RTI). These applications, which proposed a share-time operation on channel 13 in Rochester, N.Y., were complementary and comprised a single proposal; as such they were mutually exclusive with

each of eight other applications.[1] The application of Rochester Broadcasting Corp. (RBC) was denied by the examiner as in default for failure to prosecute its application. RBC has taken no exception to the examiner's recommended disposition of its application.

2. After exceptions, briefs, and replies had been filed to the initial decision, an oral argument was held before the Commission, en banc, on November 2, 1964.[2] During that oral argument each party was afforded an opportunity to address itself to a petition to reopen the record and to remand, which had been filed on October 15, 1964, by all of the applicants except RAETA, RTI, and RBC. After hearing oral argument, we concluded that the existing record did not contain sufficient evidence to resolve the questions of: (*a*) Whether alternative means were available for broadcast of the type of educational programing proposed by RAETA, and (*b*) whether a part-time applicant such as RTI would provide an effective competitive outlet for a third network service. Therefore, we reopened the record and remanded this proceeding for a further hearing so that such evidence could be adduced, FCC 65-403, released May 13, 1965. At the same time, we indicated that each applicant would be permitted to modify its programing proposal to reflect the evolving needs of Rochester. Before any hearing sessions were held, however, the applicants entered

---

[1] Throughout this decision those eight applicants will be referred to as follows: Flower City Television Corp. (Flower); Genesee Valley Television Co., Inc. (Genesee); Star Television, Inc. (Star); Community Broadcasting, Inc. (Community); Heritage Radio & Television Broadcasting Co., Inc. (Heritage); Main Broadcast Co., Inc. (Main); the Federal Broadcasting System, Inc. (Federal); and Citizens Television Corp. (Citizens).

[2] The following parties filed motions to correct the transcript of the Nov. 2, 1964, oral argument: Flower, on Nov. 19, 1964; Community, on Nov. 25, 1964; Star, on Nov. 19, 1964; Main, on Nov. 13, 1964; and RTI, on Nov. 24, 1964. No objections to the motions have been filed and they will be granted.

into a series of negotiations. As a result of those negotiations, RAETA requested the dismissal of its application so that it could use the funds it obtained as reimbursement for its expenses in connection with its application to establish a full-time educational television station on another available channel. Thereafter, RAETA's application in this proceeding was dismissed with prejudice, 2 FCC 2d 448 and 1029 (1966), and it commenced operation of station WXXI in Rochester.

3. In addition to the dismissal of RAETA's application, the impact of our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), which was adopted after the release of the remand order, must be considered in this proceeding, since we clearly indicated that the *Policy Statement* would apply to all cases to be decided in the future. In the *Policy Statement* we noted that program plans often have to be changed to take account of new conditions when the successful applicant begins operation and that our experience indicates that the program plans of competing applicants are so similar that minor differences among them generally prove to be of no significance. For these reasons, we stated that no issue would ordinarily be designated for program plans and policies, or for staffing plans or other program planning elements, and that evidence on these matters would not be considered under the standard comparative issue. As pointed out in the *Policy Statement*, each applicant has the responsibility for being familiar with the community and area to be served and for proposing an adequate programing service to meet the ascertained needs and interests. From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs. As we stated in the *Policy Statement*, such ordinary differences in judgment will not be compared in the hearing process when each of

the applicants, as here, has demonstrated that it is able to carry out its proposal.[3]

4. In view of these events which occurred after the release of our remand order in this proceeding, we concluded that no further evidentiary submissions would be required and that no useful purpose would be served by permitting the applicants to modify their programing proposals. Accordingly, the remand order was set aside so that this proceeding could be decided on the basis of the existing record (FCC 66-347, released Apr. 21, 1966). Subsequently, because of the circumstances which arose after the November 2, 1964, oral argument, we concluded that a further oral argument would be of assistance in resolving the remaining issues in this proceeding. That further argument, in which each of the nine remaining applicants participated, was held before the Commission, en banc, on May 22, 1967.[4]

5. Due to the dismissal of RAETA's application, the only issues remaining in dispute in this proceeding are those concerning Star's financial qualifications, Federal's technical qualifications with respect to its antenna site, and the standard comparison of the applicants. The examiner resolved the issues concerning Star and Federal in favor of those applicants. No exceptions have been filed to these findings and conclusions, and we adopt them as our own. We have reviewed the examiner's remaining findings of

---

[3] Because of RAETA's specialized programing proposal, the standard comparative issue in this proceeding was enlarged to determine whether there were particular types or classes of programs for which there was an unfulfilled need in the Rochester area and the extent to which that need would be met by each applicant (FCC 62-385, released Apr. 13, 1962). Since, as noted above, RAETA's application has been dismissed and station WXXI has commenced operation, the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot.

[4] Citizens filed a motion to correct the transcript of the May 22, 1967, oral argument on June 20, 1967. No objection to the motion has been filed, and it will be granted.

fact in the light of the applicants' exceptions, and it is our view that they are substantially accurate and complete. Accordingly, they are adopted with the modifications noted herein and in the appendix to this decision, where our rulings on the applicants' exceptions to the initial decision are set forth. Although the examiner proposed to grant the share-time proposal of RAETA and RTI, RAETA has withdrawn its application, and it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result.

II. PETITIONS FOR LEAVE TO AMEND

6. Before we consider the comparative qualifications of the remaining applicants, it will be of assistance to dispose of certain petitions for leave to amend applications which have been filed by several of the applicants. The substance and disposition of each pending petition is as follows:

(*a*) On June 2, 1967, Flower requested leave to amend its application to reflect that one of its stockholders, Harper Sibley, Jr., has acquired an interest in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044). No opposition to this petition has been filed, and it will be granted.[5]

(*b*) On May 18, 1967, Star requested leave to amend its application to reflect that: (1) None of its principals has any ownership interest in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.; (2) five of its stockholders, Maurice R. Forman, Robert S. Kieve, James M. Tray-

[5] On Nov. 30, 1965, Flower notified us of the death of Louis A. Wehle, an 8.33-percent stockholder, and of the voluntary petition for bankruptcy filed by Paul E. McNamara, a 0.34-percent stockholder.

hern, Jr., Vincent A. Lopopolo, and Roy Wetzel, have acquired interests in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044); (3) three of its stockholders are connected with the University of Rochester, which owns stock in Harcourt, Brace & World, Inc., which, in turn, has filed an application for a new UHF television station in Rochester, N.Y. (file No. BPCT-3922);[6] (4) Robert S. Kieve and James M. Trayhern, Jr., have agreed, prior to moving to San Jose, to transfer portions of their interests in the applicant to Maurice R. Forman, thus reducing their stockholdings in the applicant to 5 and 2 percent, respectively; and (5) Maurice R. Forman has been elected a director of the Federal Reserve Bank of New York. No opposition to this petition has been filed, and it will be granted.

(*c*) On May 16, 1967, Community notified us that: (1) One of its stockholders, F. Robert Greene, is no longer connected with the application of WEXC, Inc., for a new standard broadcast station in Depew, N.Y. (docket No. 14031), which application has been dismissed by the Review Board (FCC 64R-314, released June 8, 1964); (2) the nonbroadcast business activities of F. Robert Greene have changed in certain respects; and (3) another of its stockholders, Michael R. Hanna, would completely sever his connection with Cornell University station WHCU, rather than merely taking a leave of absence from that position, in order to become Community's director of education and public affairs in the event of a grant of Community's application.

[6] By a public notice, dated June 27, 1967, we announced that the Harcourt, Brace & World, Inc., application for Rochester had been dismissed pursuant to sec. 1.568(a) of our rules. In addition, Harcourt, Brace & World, Inc., has returned the construction permits for new television stations in other communities, which it had previously obtained.

(*d*) On January 28, 1964, Heritage requested leave to amend its application to reflect the death of Roland G. McDonald, a 4-percent stockholder.[7] No opposition to this petition has been filed, and it will be granted. On October 22, 1964, Heritage requested leave to amend its application to reflect the death of James M. Landis, who was a joint tenant of a one-fourth undivided 2-percent interest in the applicant and to reflect the vesting of his interest in the surviving joint tenants, Justin N. Feldman, Lawrence H. Reilly, Jr., and George J. Solomon. No opposition to this petition has been filed, and it will also be granted.

(*e*) On November 29, 1965, RTI filed a petition requesting leave to amend its application to specify full-time instead of part-time, hours of operation and to alter its financing proposal. Oppositions were filed by Flower, Star, Federal, Citizens, and the Broadcast Bureau, and RTI filed a reply in response to those oppositions. Because it appeared that grant of RTI's petition would require an additional hearing and would further delay the resolution of this proceeding, we concluded that RTI's petition for leave to amend its application should be denied, FCC 66-593, released July 8, 1966. During the May 22, 1967, oral argument, RTI again requested leave to amend its application to specify full-time operation and argued that a further hear-

[7] This petition was dismissed in our order remanding this proceeding for a further hearing, FCC 65-403, released May 13, 1965, when the applicants were directed to submit such information as part of the overall up-dating of their proposals. However, Heritage failed to resubmit this request, and the remand order was subsequently set aside, FCC 66-347, released Apr. 21, 1966. Under these circumstances, it is appropriate to consider the merits of Heritage's Jan. 28, 1964, petition at this time. Similarly, a petition for leave to amend its application, filed by RAETA on June 24, 1964, was dismissed by the remand order, and the request was never resubmitted. In view of the dismissal of RAETA's application, this petition will be dismissed as moot.

ing would not be required since the initial decision contains complete findings of fact with respect to all of the applicant's principals. After further consideration, we are persuaded that the public interest would be better served by permitting RTI, without altering its comparative qualifications, to bring its proposal up to date so that this proceeding can be decided on the basis of the facts as they now exist. For this reason, we shall grant RTI's request for leave to amend its application to the extent of permitting it to specify full-time operation.

III. EVALUATION OF COMPARATIVE CRITERIA

A. Diversification of Control of the Media of Mass Communications

7. When the record was closed in this proceeding, Star, Community, and Federal each had substantial connections with other broadcast interests. As noted in paragraph 6, however, Star's principals have disposed of their interests in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.;[8] and Community's stockholder, F. Robert Greene, is no longer connected with an application for a new standard broadcast station in Depew, N.Y. On the other hand, Federal continues to be connected with both station WSAY, Rochester, and station WNIA, Cheektowaga, N.Y. Federal is itself the licensee of WSAY and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, thus providing complete common control between the proposed television station and the two standard broadcast stations. Although

[8] Although both Star and Flower have amended their applications to reflect an ownership interest in the assignee of standard broadcast station KLIV in San Jose, Calif., by certain of their stockholders, we are not persuaded that such ownership interests should be given any significant weight in this proceeding; in view of KLIV's distance from Rochester and the less than controlling interests held.

WNIA, is located about 70 miles west of Rochester, WSAY is located in Rochester, where Federal's proposed television station would be located. Since none of the other applicants is otherwise associated with the media of mass communications to any significant extent,[9] we conclude that an equal preference must be given to each of those applicants over Federal on this very important criterion. While the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of those applicants would provide a new voice in the Rochester area. For these reasons, we conclude that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications.

B. Participation in Station Operation by Owners

8. On this important factor all of the applicants, with the exception of Genesee and Heritage, propose full-time participation by a substantial percentage of the stock ownership, but none, with the exception of Federal, proposes to have more than one-half of the ownership interest represented in full-time station operation. Genesee has no full-time participation by any person with an ownership interest and Heritage has almost none. Federal has 100 percent integration of ownership with management. In addition, Federal's participation is by a long-term local resident with many years of radio experience. Federal, therefore, is to be substantially preferred over the other applicants on this factor. Among the other parties with substantial integration, Flower ranks the highest, in view of the

[9] Under the circumstances of this proceeding, we are convinced that the facts with respect to Genesee's alleged connection with the Gannett Co., Main's connection with a common carrier service, and Citizen's connection with a local FM station are not sufficient to warrant an adverse conclusion as to any of these applicants.

broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II. We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main, and Federal. However, in view of the fact that the great majority of Flower's stock is held by persons with area familiarity and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station, as is also true of most of the other applicants, we do not believe that in this particular case the absence of past local residence by the two stockholders participating full time in the operation of the station is so significant. In addition, as we noted in the *Policy Statement*, persons participating full time in station operation by definition will become local residents. In view of our conclusions, we do not believe further ranking of the other parties, some of whom are very close, is necessary on this issue.

C. Proposed Program Service

9. In view of our discussion with respect to this criterion in paragraph 3, supra, we are convinced that none of the applicants is entitled to a preference over any of the other applicants on the basis of its preparation and planning, its staffing, or its program policies and proposal.

D. Past Broadcast Record

10. Among the applicants, Star, Community, and Federal presented evidence with respect to the operation of broadcast stations in which their principals held an ownership interest.[10] In the *Policy Statement*, supra, we stated that a

---

[10] Although Larson, who is a 10-percent stockholder in Flower, had an ownership interest in station KDYL–AM and KDYL–TV in Salt Lake City, Utah, during the period 1953-59, no exception was taken to the examiner's finding that the information in the record was not sufficiently comprehensive to form the basis for a judgment with respect to the operation of those stations.

past broadcast record within the bounds of average performance will be disregarded, since at least average future performance is expected. Thus, unless such a record is unusually good or unusually bad, it will not be given weight in the comparative analysis. The examiner's findings establish that both Star's and Federal's broadcast stations have adopted a music and news programing format. Although each has provided some local live programing and some non-entertainment programs, we are not persuaded that any of the stations has shown such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record. In view of the average performance by each of these stations, we conclude that neither Star nor Federal is entitled to a preference over any of the other applicants with respect to this criterion.

11. On the other hand, Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station. At the time of WHAM's acquisition by Greene in 1956, the assignee proposed to limit entertainment programing to approximately 70 percent of the broadcast schedule. During the 1958 composite week, entertainment programing comprised only 62.4 percent of the broadcast schedule, live programing was broadcast 24.48 percent of the time and, except for discussion programs, the promised percentages in the nonentertainment categories were exceeded in every instance. Community's showing demonstrated that talks, interviews, and discussions on community issues and problems were carried on WHAM in several regularly scheduled entertainment and talk programs. In addition, WHAM carried regularly a weekday 5-minute commentary on local events and a 30-minute Sunday afternoon roundtable discussion of local projects and problems. In view of the facts that Greene was general manager and an owner of WHAM

during this period [11] and that Greene proposes to be active in a full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it. For these reasons, we conclude that Community is entitled to a preference over all of the other applicants on the basis of its 15 percent stockholder's relationship to WHAM's past broadcast record.

E. Other Criteria

12. None of the applicants claims a preference with respect to the efficient use of this television channel, and, accordingly, we do not find any difference among the applicants with respect to this criterion. Although we have indicated that a comparative hearing should not be converted into a search for remote and insignificant blemishes on the applicants' reputation, the *Policy Statement* notes that substantial character deficiencies may warrant disqualification or a demerit in the comparative analysis. In this proceeding, the examiner made findings concerning the qualifications of Heritage's president, director, and 2 percent stockholder, Bernard P. Birnbaum. The record establishes that Birnbaum was chairman of the board of directors and one of four promoters of the Faradyne Electronics Corp. when the Securities & Exchange Commission suspended the effectiveness of two registration statements filed by the corporation. In support of its action, the Securities & Exchange Commission stated that the corporation had filed unreliable and materially false and misleading registration statements in an effort to raise public funds; most of which were to be used to make payments to the corpora-

[11] Although Greene retained his interest in WHAM and in two other stations for less than 3 years, we are not persuaded that such a fact should preclude consideration of the merits of WHAM's past broadcast record in our comparison of all the applicants.

tion's promoters pursuant to transactions either not revealed or described in deceptive terms. Although given an opportunity to show that he had no knowledge, responsibility, or involvement in these matters, Birnbaum merely stated that he never did any active work for the corporation. Under these circumstances, we are convinced that this must be considered to be a substantial reflection on Birnbaum's and Heritage's character qualifications, and that a comparative demerit must be assessed against Heritage because of Birnbaum's connection with the corporation's misconduct.

IV. CONCLUSION

13. We believe that the public interest would best be served by a grant to Flower. We conclude that no perferences are warranted with respect to the proposed program services and the efficient use of this television channel. In view of Birnbaum's connection with the Faradyne matter, we hold that a comparative demerit must be assessed against Heritage. We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises

from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50 percent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower.

14. *Accordingly, it is ordered:*

(*a*) That the motions to correct the transcript of the November 2, 1964, oral argument, filed November 13, 1964, by Main; November 19, 1964, by both Flower and Star; November 24, 1964, by RTI; and November 25, 1964, by Community, *Are granted.*

(*b*) That the motion to correct the transcript of the May 22, 1967, oral argument, filed June 20, 1967, by Citizens, *Is granted.*

(*c*) That the petition for leave to amend its application, filed June 2, 1967, by Flower, *Is granted.*

(*d*) That the petition for leave to amend its application, filed May 18, 1967, by Star, *Is granted.*

(*e*) That the petitions for leave to amend its application, filed January 28 and October 22, 1964, by Heritage, *Are granted.*

(*f*) That the petition for leave to amend its application, filed on June 24, 1964, by RAETA, *Is dismissed* as moot.

(*g*) That the memorandum opinion and order (FCC 66-593, released July 8, 1966) *Is set aside* and that the petition for leave to amend its application, filed on November 29, 1965, by RTI, *Is granted* to the extent reflected in paragraph 6(e) of this decision.

(*h*) That the application of Flower City Television Corp., file No. BPCT-2929, for a construction permit for a new television broadcast station to operate on channel 13 in Rochester, N.Y., *Is granted;* and that each of the other applications designated in the caption of this decision *Is denied;* and

(*i*) That the construction authorized herein is subject to the condition that the ability of standard broadcast stations WBBF, WROC, WHEC, and WSAY to operate in accordance with the terms of their licenses shall not be adversely affected thereby, particularly with respect to their radiation patterns, and that at least five field intensity measurements on each radial established during the last proof of performance for each of these standard broadcast stations shall be submitted with the television application for license to prove that such patterns have not been materially affected.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

9 F.C.C. 2d

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF FLOWER CITY TELEVISION CORP.

Exception No.	*Ruling*
1-5, 7, 13-16, 28-46, 48-54, 56	Denied. The examiner's findings adequately and correctly reflect the record.
6	Granted. "Sixteen" is substituted for "six" in the first sentence of finding 22.
8-12, 92-95, 111-112, 122-123, 131-132, 135-136, 143, 145, 150-151, 166-170	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
17-27, 47, 55, 59-91, 96-110, 118-119, 129-130, 139-141, 147, 152, 154, 159, 162-165	Denied. These matters are moot in view of the dismissal of RAETA's application.
57-58, 114, 117, 157	Denied. See pars. 3 and 9 of our decision herein.
113, 115-116, 120-121, 124-128, 133, 142, 148, 158	Granted. See par. 5 of our decision herein.
134, 137-138, 144, 146, 149, 160-161	Granted to the extent reflected in our decision herein.
153	Denied. See footnote 9 to par. 7 of our decision herein.
155-156	Denied. See pars. 10 and 11 of our decision herein.

EXCEPTIONS OF GENESEE VALLEY TELEVISION CO., INC.

1-12, 36-42	Denied. The examiner's findings adequately and correctly reflect the record.
13, 63, 67	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
14-35, 43-47, 51-53, 71-73	Denied. See pars. 3 and 9 of our decision herein.
48-50, 56	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-55, 57-62, 68	Granted. See par. 5 of our decision herein.
64-66, 69-70	Denied. See par. 8 of our decision herein.
74-75	Denied for the reasons set forth in our decision herein.

EXCEPTIONS OF ROCHESTER AREA EDUCATIONAL TELEVISION ASSOCIATION, INC.

1-54	Denied. These matters are moot in view of the dismissal of RAETA's application.

EXCEPTIONS OF STAR TELEVISION, INC.

1, 3-19, 21-39, 41-54, 57-58, 60-69, 71-82, 84-89	Denied. The examiner's findings adequately and correctly reflect the record.
2	Denied. This matter is moot. See pars. 6 and 7 of our decision.
20, 40	Denied. The challenged actions were correct.
55-56, 59, 70, 90	Denied as not of decisional significance.
83, 91-130	Denied. These matters are moot in light of the dismissal of RAETA's application.

Exception No.	*Ruling*
Exceptions to Conclusions	
1	Granted. See par. 5 of our decision herein.
2-5, 12	Denied. These matters are moot in view of the dismissal of RAETA's application.
6-7	Denied. See par. 8 of our decision herein.
8-11	Denied. See pars. 3 and 9 of our decision herein.
13	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF COMMUNITY BROADCASTING, INC.	
A-1 to A-2, B-1 to B-23, C-1, C-4 to C-8, C-10 to C-15, D-1, D-7 to D-8	Denied. The examiner's findings adequately and correctly reflect the record.
B-24	Denied. The examiner was correct in holding that the past broadcast record of stations WHCU and WHCU-FM is immaterial since Hanna had no ownership interest in those stations.
C-2, D-5 to D-6	Granted. The clauses are deleted.
C-3, D-3 to D-4	Denied. The examiner's reasoning is correct.
C-9, D-2, D-9 to D-12	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
E-1 to E-23, F-1(f), F-1(l)	Denied. These matters are moot in view of the dismissal of RAETA's application.
F-1(a) to (d), F-1(g), F-1(j) to (k), F-1(m) to (n)	Granted. See par. 5 of our decision herein.
F-1(e)	Denied. See footnote 9 to par. 7 of our decision herein.
F-1(h) to (i)	Denied. See pars. 3 and 9 of our decision herein.
F-2	Granted to the extent reflected in our decision herein and denied in all other respects for the reasons stated in our decision herein.
EXCEPTIONS OF HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.	
1-4, 14, 16-19, 23, 26	Denied. The examiner's findings are correct and are supported by the record.
5, 11-13, 15, 24-25	Denied. The examiner's findings adequately and correctly reflect the record.
6-10, 27-49, 60	Denied. These matters are moot in view of the dismissal of RAETA's application.
20-22	Denied. The requested adverse findings are immaterial in light of our decision herein.
50-54(3), 57	Granted. See par. 5 of our decision herein.
54(4)-55	Denied. See par. 8 of our decision herein.
56	Denied. See pars. 3 and 9 of our decision herein.
58-59, 61	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF MAIN BROADCAST CO., INC.	
1-32	Denied. The examiner's findings adequately and correctly reflect the record.
33-39, 51-53, 70	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
40-50, 75	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-58	Granted. See par. 5 of our decision herein.
59-66	Denied. See par. 8 of our decision herein.
67-69, 71-73	Denied. See pars. 3 and 9 of our decision herein.
74, 76	Denied for the reasons set forth in our decision herein.

Exception No.	*Ruling*
EXCEPTIONS OF FEDERAL BROADCASTING SYSTEM, INC.	
1	Denied. The examiner's ruling is correct.
2-9	Denied. The examiner's findings adequately and correctly reflect the record.
10, 12-14	Granted. See par. 5 of our decision herein.
11	Denied. These matters are moot in view of the dismissal of RAETA's application.
15-18	Granted to the extent reflected in par. 8 of our decision herein.
19-22, 24	Denied. The requested adverse conclusions are immaterial in light of our decision herein.
23	Granted to the extent reflected in par. 10 of our decision herein.
25	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF CITIZENS TELEVISION CORP.	
1, 3, 7-14, 21, 22, 26, 28-30, 32-36, 56	Denied. The examiner's findings adequately and correctly reflect the record.
2, 4, 5, 15, 23-25, 27, 31	Denied for failure to comply with sec. 1.277(a) of the Commission's rules.
6	Denied as not of decisional significance.
16-20, 37-54, 65-66, 71	Denied as moot in view of the dismissal of RAETA's application.
55, 72	Denied. See our entire decision herein.
57-61, 63-64	Denied in substance. See pars. 3, 8, and 9 of our decision.
62, 68, 69	Denied in substance. See pars. 10 and 11 of our decision.
67	Denied in part and granted in part. See par. 7 of our decision.
70	Granted in substance as to 70(c) and otherwise denied. See par. 12, also 10 and 11 of our decision and the ruling, supra, on exception 16 of Citizens Television Corp.
EXCEPTIONS OF ROCHESTER TELECASTERS, INC.	
1	Granted in substance. See par. 8 of our decision herein.
2	Denied. See footnote 9 to par. 7 of our decision herein.

Dissenting Statement of Commissioner Robert T. Bartley

In this decision, the Flower application is not preferred in any of the six comparative criteria, yet it is granted and the other nine applications are denied.

I dissent and vote to grant the application of the Federal Broadcasting System, Inc.

The majority decision awarded a substantial preference to Federal in the comparative criterion of "participation in station operation by owners." There can be no argument with that finding. Federal is the only applicant herein having 100 percent integration of ownership with management, and that is by a long-term local resident with many years of radio experience. In terms of the likelihood of effectuation of proposals, greater certainty lies, I believe, with an applicant whose knowledge of local needs is brought to the day-to-day management and operation of the station. Gordon Brown, Federal's sole stockholder, would devote 40 hours per week as general manager. With his lifetime residence in Rochester, his long association in the broadcasting industry, and his operation of a radio station (WSAY) in Rochester for many years, Gordon Brown (Federal), of all of the applicants herein, makes the most convincing showing that the views of the locally oriented ownership would be directly translated into the daily operation of the station and that the licensee would remain aware of and responsive to community needs on a continuing basis. None of the other applicants herein proposes to have more than one-half of the ownership interest represented in full-time station operation.

I disagree further with the finding in the majority's decision that Flower ranks second to Federal in the criterion of "participation in station operation by owners." As the decision seems to admit, the fact that most of the Flower stock is held by persons with area familiarity and by per-

sons who will devote some time to the operation of the station is also true of most of the other applicants. Thus, Flower should be rated equal to, and not superior to, applicants other than Federal.

The majority decision awards each of the other applicants a substantial preference over Federal on the comparative criterion of "diversification of control of the media of mass communications" because Federal is the licensee of WSAY, Rochester, and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, Cheektowaga, N.Y. The weight of those preferences is diminished substantially, in my opinion, by the existence of 16 broadcast stations licensed in Rochester (six AM, seven FM, three TV, including channel 13). I agree that, as set forth in our *Policy Statement on Comparative Broadcast Hearing,* diversification of control of media of mass communications is a primary factor in comparative considerations. However, it is my position that, in diversification of control of media, a licensee's facilities, i.e., AM, FM, TV, make up a broadcast unit. As technical advancements were made, and an AM licensee added FM and TV to enhance its broadcast service in the community, I believe the public interest was benefited. Thus, I find generally that a proposal to add a facility to such a locally oriented unit is in the public interest and not subject to demerit per se. See my concurring statement in *Peoples Broadcasting Corp.,* docket No. 15619 (May 19, 1967). The majority here states that the preferences to the other applicants "must be considered substantial in this proceeding because each of those applicants would provide a 'new voice' in the Rochester area." I disagree. I believe that more basic than the matter of a "new voice" is the quality of the "voice" that is added to the area.

In my evaluation, the preference of each applicant over Federal on diversification of control of mass media is reduced from substantial to slight, and Flower's second place

to Federal is reduced to equal status with the applicants other than Federal.

With Flower receiving no preference in any of the comparative criteria, even pursuant to the majority decision, I believe that a grant is not supported. As indicated above, I believe that the preference for Federal is decisive and that its application should be granted in the public interest.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I have indicated before my concern that the comparative hearing process is a thoroughly unsatisfactory way to award valuable broadcast properties. *Farragut Television Corp.*, 8 F.C.C. 2d 279, 285 (1967) (dissenting statement). No better example could be chosen to demonstrate this than the case which the Commission decides today.

At stake is a Rochester, N.Y., VHF station which will likely be worth about $4 million as soon as it is operating with a 3-year license and a network affiliation. Thus, understandably, there are nine contenders in the ring battling for the construction permit after which the award of a regular license is a formality.

First, the case is an example of the intolerable delay which can accompany the comparative process. Designation for hearing was on November 15, 1961. Further appeals seem likely, and remand and further hearings are, at least, possible. But, even if the present decision survives appeal, the case will have taken 6 years for resolution.

But more fundamentally disturbing than the delay is the unsatisfactory result which the Commission eventually reaches. The point is not that I would award the construction permit to a different applicant than has the Commission. I would, but my preference is not a strong one, and the Commission's choice is quite satisfactory. The point is that there is so little in the way of significant

differences among most of the nine applicants that the extraordinary marathon conducted by the Commission and the applicants has produced no more satisfactory result than would a drawing from a hat.

The Commission's choice to run this Rochester station is Flower City Television Corp. Flower is chosen over the eight other applicants because it ranks second in what we call the "integration of ownership and management" (and the majority here calls "participation in station operation by owners"). The first in this regard, Federal Broadcasting System, Inc., unlike Flower, has a substantial detriment on other grounds. But it is clear that the preference for Flower over the other applicants on "integration" cannot be very great. Less than 20 percent of Flower's stock is held by persons intending to participate in station affairs on a full-time basis. Federal's one stockholder will be active in station affairs on a full-time basis, and four other applicants have more full-time integration than Flower. The majority is able to point to other related facts to bolster Flower's position on integration. Almost 80 percent of its shareholders will devote some time to the station, but four of the other candidates exceed Flower in this showing. The majority also points to Flower's stockholders who are familiar with the Rochester area, but none of these plan full-time devotion to station affairs, and as much area familiarity is also found in several of the other applicants. Likewise, Flower's percentage of fully "integrated" shareholders with broadcast experience, also alluded to by the majority, is exceeded by several of the other applicants.

It may well be that, by combining all these factors and calling them by the undescriptive title "integration of ownership and management" or "participation in station operation by owners," it is possible to conclude that Flower ranks second to Federal on this criterion for selection. But it is quite clear that the choice is not a certain one,

and that the Commission might, with a colorable justification, have chosen a number of the other applicants over Flower.

Although Federal clearly excels in the "integration" showing, I would have to agree with the Commission that it should not be awarded this station. Federal is the only applicant which already controls a Rochester broadcasting station. I attach great importance to diversifying control of broadcast media both in the country and in individual communities. Thus, I cannot agree with Commissioner Bartley that a licensee should be allowed an AM, an FM, and a TV station in any community before he receives a diversification demerit. On the contrary, local diversification seems even more important to me than national diversification.

Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record, because its proposed general manager and significant stockholder has a commendable record.

I do not make this judgment confidently, for it appears to me impossible to make meaningful distinctions between applicants with such insignificant and noncomparable differences. The comparative process for selection of broadcasting licensees is a sad commentary on the American administrative process. The basic bankruptcy of the approach and the absence of any correlation between the results reached and any discernible policy has been demonstrated long ago. I am neither the first to feel or to say this, yet neither Congress nor this Commission has made necessary moves to change the process—a change which is long overdue.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y., ET AL. For Construction Permits for New Television Broadcast Stations (Channel 13)	Dockets Nos. 14394, 14395, 14460, 14461, 14462, 14464, 14465, 14466, 14467, 14468 File No. BPCT-2929

Memorandum Opinion and Order

(Adopted November 22, 1967)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER JOHNSON DISSENTING.

1. This proceeding involves 10 mutually exclusive applications for construction permits for a new television station to operate on channel 13 in Rochester, N.Y. By our decision (FCC 67-924, 9 FCC 2d 249), released August 3, 1967, we granted the application of Flower City Television Corp. Seven of the nine remaining applicants, Genesee Valley Television Co., Inc., Community Broadcasting, Inc.,[1] Heritage Radio & Television Broadcasting Co., Inc., Main Broadcast Co., Inc., the Federal Broadcasting System, Inc., Citizens Television Corp., and Rochester Telecasters, Inc., have now filed petitions for reconsideration of that decision. Oppositions to those petitions were filed by Flower and the Broadcast Bureau, and replies to the oppositions were filed by Community, Main, and Citizens.

---

[1] Because its petition for reconsideration exceeds our limitation on such pleadings by one-third of a page, Community filed a request for acceptance of its petition for reconsideration on Sept. 5, 1967. No opposition has been filed to Community's request. In view of the de minimis nature of Community's violation, its petition for reconsideration will be accepted.

2. In our decision, we held that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications criterion due to Federal's connection with stations WSAY, Rochester, and WNIA, Cheektowaga, N.Y. Federal was given a substantial preference over all of the other applicants for its participation in station operation by owners because of the full-time integration of its 100 percent owner, Gordon P. Brown, but Flower was preferred over all remaining applicants in view of the extensive broadcasting, and particularly television, experience of G. Bennett Larson, and the somewhat lesser broadcast experience of Gordon Auchincloss II. While some other applicants had greater degrees of integrated local residence, we noted that the significance of the absence of past local residence by Flower's two fully integrated stockholders was diminished by the facts that the great majority of Flower's stock is held by local residents and that the great majority of its stockholders will devote some time to the operation of the station. We also held that Community was entitled to a preference over all of the other applicants for the commendable past broadcast record of station WHAM, Rochester, when Community's 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station.

3. In conclusion, we stated that Flower was preferred over Federal, since the public interest in a television station in Rochester, which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We also preferred Flower over Community, whose integrated stockholders also lack area familiarity, because of the former's superiority, arising from the experience factor, in the area of participation in station operation by owners. While Community's past broadcast record was commendable, we held that it was not so outstanding as to warrant

substantial weight, since it was not the past record of Community, itself, but rather that of its 15 percent stockholder and proposed general manager. Thus, we concluded that the public interest would be best served by a grant to Flower.

4. Some of the instant petitioners have advanced the threshold contention that there has been no valid initial decision in this proceeding; that they have been deprived of their right to file exceptions to a proper initial decision; and that our decision is, therefore, procedurally defective. They urge that the failure of Presiding Examiner Annie Neal Huntting to rank each of the losing applicants under the comparative criteria and the dismissal of the application of the Rochester Area Educational Television Association, 2 FCC 2d 448 and 1029 (1966), render invalid the initial decision which was released in this proceeding. We are convinced that these contentions are entirely without merit. The initial decision prepared by Examiner Huntting made exhaustive findings of fact with respect to each applicant's showing under all of the comparative criteria, and included ample conclusions of law and a comparative analysis of each of the applicants.

5. It is clear that the initial decision complies with all of the requirements of the Administrative Procedure Act and of our regulations, since it included a statement of findings and conclusions, as well as the reasons or basis therefor, upon all issues of law and fact; since the parties were fully informed of the issues and proposed grounds of the decision; and since the initial decision was susceptible when it was released of becoming final Commission action. Under secton 1.276 of our rules, the initial decision in this proceeding was precluded from becoming a final action by the exceptions which were filed long before RAETA's application was dismissed, so that the latter action could not have deprived the initial decision of the validity which it had when it was released. It is also clear

that each of the applicants filed extensive exceptions to the initial decision, obviously demonstrating that the parties had been fully informed of the issues and the proposed grounds of the decision.

6. While the exceptions of some of the applicants objected to the examiner's failure to rank all of the losing applicants among themselves in claiming that their proposals should be granted, none of the applicants argued then or at any time prior to the oral argument of May 22, 1967, that it was necessary to remand this proceeding for the preparation of a new initial decision. Indeed, as late as March 27, 1967, the applicants, which now claim that our final decision is procedurally defective, joined in a petition urging us to resolve this proceeding by issuing such a decision. In view of all of these facts and circumstances and the further fact that each of the applicants' extensive exceptions was considered in detail, we are convinced that none of the applicants in this proceeding has been deprived of any procedural right and that these contentions must be rejected.

7. In other respects the petitions for reconsideration which have been filed in this proceeding are substantially devoted to a further analysis of the reasons why each petitioner's application should be granted.[2] Since each of the

[2] In connection with its claim that its application should be granted, Citizens, on Sept. 5, 1967, filed a petition for leave to amend, requesting us to accept its amendment in which its 10 percent stockholder, William A. Fay, would commit himself to devote his full time to Citizens' proposed station. Citizens contends that the amendment is consistent with Fay's original commitment to devote at least 15 hours weekly and full time if necessary and that due process requires acceptance of the amendment, since Community's request to improve its integration proposal was granted. Flower opposes Citizens' petition, urging that it is a blatant attempt to secure an advantage in this comparative proceeding and that it would require a further hearing to permit cross-examination of Fay if the amendment were granted. We agree

petitioners merely relies upon its own evaluation of the comparative qualifications of each of the applicants, we are not persuaded that any useful purpose would be served by a further summary of those contentions. As is apparent from our decision, there are a number of outstanding applicants in this proceeding, and it has been very difficult to select the one applicant that is superior to all of the others. However, one of those applicants must be chosen to be the licensee of this Rochester television station and, thus, the problem in this extremely close proceeding has been to determine which of the applicants is the best. In furtherance of that purpose, we have permitted the parties to present oral argument on two different occasions,[3] and we have given lengthy and detailed consideration to the applicants' views which they have presented in their arguments, in their exceptions, and in their briefs.

8. The petitioners are once again arguing that their versions of the facts require grant of their respective

---

with Flower that Citizens' petition should be denied. Citizens' request is an undisguised attempt, long after the record has been closed, and even after the final decision was issued, to improve its comparative posture to the detriment of the other applicants in this proceeding. Citizens' petition must be denied, since the other applicants would be entitled to a further hearing to test Citizens' improved proposal and since there is no justification for the gross delinquency with which this proposed modification has been filed. For these same reasons, no weight can be given to the events occurring after the close of this record, which Citizens now relies on in its petition for reconsideration. Citizens is in error when it contends that we granted Community's request to improve its integration proposal. Although par. 6(c) of our decision recites that Community had notified us of certain facts with respect to its stockholder, Michael R. Hanna, those facts could not be, and were not, given any weight in our comparative evaluation of the applicants in this proceeding.

[3] Although some of the petitioners have again requested oral argument in connection with the present pleadings, we are persuaded that each of the applicants has had ample opportunity to make an oral presentation of its views in this proceeding.

proposals for essentially the same reasons that they have been urging throughout this proceeding. It is clear that rehearing will not be granted merely for the purpose of again debating matters which we have fully considered. See *WWIZ, Inc.*, 37 FCC 685 (1964). Nonetheless, while we concluded that Flower's application should be granted only after exhaustive consideration of this record and thorough analysis of the comparative qualifications of each of the applicants, we have again reviewed our decision in light of petitioner's present contentions and we are convinced that they have presented no reason which warrants a departure from the findings [4] and conclusions contained in that decision. Under these circumstances, we remain convinced that the public interest will be best served by a grant of Flower's application and, thus, the petitions for reconsideration of that determination must be denied.

9. Accordingly, *It is ordered:* (*a*) That the request for acceptance of petition for reconsideration, filed on September 5, 1967, by Community Broadcasting, Inc., *Is granted;* (*b*) that the petition for leave to amend, filed on September 5, 1967, by Citizens Television Corp., *Is denied;* and (*c*) that the petitions for reconsideration, filed on September 5, 1967, by Genesee Valley Television Co., Inc., Community Broadcasting, Inc., Heritage Radio & Television Co., Inc., Main Broadcast Co., Inc., the Federal

---

[4] Citizens asserts that we have failed to resolve the problem raised by its exception No. 8 concerning the past broadcast records of stations WHAM, WHFM, and WHAM-TV, Rochester, while Citizens' stockholder, William A. Fay, was a 1-percent stockholder of those stations. While our ruling that the examiner's findings adequately and correctly reflect the record resulted from the ambiguity with which Citizens' exception was stated and from Citizens' failure to claim any preference in its exceptions to the examiner's conclusions, that ruling need not be revised, since our ruling on Community's exception No. C-3, which involves the same portions of the initial decision, clearly disposes of Citizens' present argument.

Broadcasting System, Inc., and Citizens Television Corp.; and on September 1, 1967, by Rochester Telecasters, Inc., *Are denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I would grant reconsideration and, for the reasons set forth in my statement with the decision, released August 3, 1967, herein (9 FCC 2d 249), grant the application of the Federal Broadcasting System, Inc.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,277

STAR TELEVISION, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,541

COMMUNITY BROADCASTING, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,542

CITIZENS TELEVISION CORP., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,544

HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,545

GENESEE VALLEY TELEVISION CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,546

MAIN BROADCAST CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,547

ROCHESTER TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

Appeals From a Decision and Order of the Federal Communications Commission

---

Decided January 30, 1969

* * * * * * * * * *

Before PRETTYMAN, *Senior Circuit Judge,* and BURGER and LEVENTHAL, *Circuit Judges.*

PRETTYMAN, *Senior Circuit Judge:* These are appeals from a decision and order of the Federal Communications Commission, in which the Commission awarded a construction permit for a television broadcast station on Channel 13 at Rochester, New York. There are eight appellants in as many appeals, consolidated. The appeals are from a

Decision[1] and a Memorandum Opinion and Order[2] in which reconsideration was denied.

The case was enormously complicated and tedious. The channel was newly allocated to this location. Twelve applicants filed, and their applications were referred to an examiner for comparative hearing and decision. Her findings of fact in the consolidated proceeding were 253 finely printed pages in length. The applicant to which she recommended a grant (a combination of two applicants on a share-time basis) withdrew its application. Whereupon the Commission remanded, then withdrew the remand, held further oral arguments, rendered a decision in which it adopted the examiner's findings, made further findings, and rendered an award.

Appellants say the Commission failed to resolve all the issues raised by them, violated its policy statement in a number of respects, failed to give weight to certain derelictions or shortages of the successful grantee, ignored uncontradicted evidence, acted arbitrarily, did not apply the comparative criteria to all applicants—a total of sixteen points. They argue, *inter alia,* that, when the application of the initially successful grantee was withdrawn, the entire initial decision became meaningless and so the parties have been deprived of their right to have an examiner "pass upon their proposed findings and conclusions addressed to the factual situation as it actually exists." The last-stated contention is obviously untenable. Basic facts do not derive their characteristics from the conclusion one may draw from them. If the conclusion be changed, the underlying facts are not thereby changed. Even if the conclusion be withdrawn, the facts remain facts, and if they were correctly found the findings remain unchanged. In addition to this consideration on the point

---

[1] Flower City Television Corp., et al., 9 F.C.C.2d 249 (1967).

[2] 10 F.C.C.2d 718 (1967).

made by appellants, we note there was a reargument of the case after the withdrawal of the initially successful applicants.

We think we need not discuss any of the other contentions, with one exception. The noteworthy phase of the dispute concerns principally the procedural requirements in a decision in a comparative case. The Commission had developed guidelines, which it called "criteria" and which it used for comparative measurement purposes. In the course of usage these criteria acquired names. Thus, some of them are Area Familiarity, Integration of Ownership and Management, Broadcast Experience, Diversification of Control of Mass Media, etc. In the midst of the present proceeding the Commission published a "policy statement", in which, with vigorous internal discussion and difference of opinion but with considerable flexibility in the result, it discussed some criteria at length, others summarily, and described the policies it intended to follow in making comparative decisions.[3]

The reasoning of the Commission in the matter at bar may be a bit circuitous, but it is clear and amply supported by findings of fact and by the evidence. We pointed out in *Johnston Broadcasting Co.* v. *FCC*[4] the decisional process to be followed in disputes of fact. We said there should first be findings of basic facts, based directly on evidence; then there should be findings of ultimate facts, which are drawn from the basic facts; and then a conclusion should be given, based on the ultimate facts. In this concept of the process the basic facts should be drawn, at least initially, by the examiner, if there be one, since it is he who sees and hears the witnesses. In that opinion we said:

> "(5) Findings must be made in respect to every difference, except those which are frivolous or wholly un-

[3] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

[4] 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

substantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."[5]

This latter clause did not mean, as appellants seem to contend, that the Commission must reach and state a comparison between each pair of applicants in respect to each criterion.[6] It meant findings in respect to each applicant as to every point of comparison suggested by a party, and then a composite consideration.

The Commission stated, clearly and emphatically, that it preferred Flower over all other applicants on the basis of broadcast experience. When a finding of preference "over all other applicants" is thus made, it is unnecessary to name separately each other applicant. In the case at bar a reading of the findings respecting the broadcasting experience of the several people scheduled to be in the management of each of the applicants shows clearly the reason for the preference of Flower on the point. The Commission, with all the facts before it in detailed findings, exercised a judgment which it was empowered to make. The basis for the choice is clear in the basic findings.

For reasons which it stated, the Commission gave each of the other applicants otherwise associated with the media of mass communication a substantial preference over Federal on that criterion (Diversification of Control of Media of Mass Communication). In respect to Participation in Station Operation by Owners (Integration of Ownership and

---

[5] Id. at 46, 175 F.2d at 357.

[6] Such a task would be burdensome to the point of the ridiculous in some cases, as in the present one. To compare each of eight applicants with each other applicant in respect to each of eight criteria would require 224 comparisons, according to our combinatorial analysis.

Management), Federal was substantially preferred over the other applicants, and among the other applicants Flower was ranked highest on this point. The Commission found no preference in respect to Proposed Program Service. In respect to the criterion Past Broadcast Service (the operation of broadcast stations in which the present applicants' principals held an ownership interest), three applicants presented evidence. The Commission gave a preference to one (Community) on this point and denied any to the other two. The Commission awarded a demerit to one applicant on account of a character deficiency of one of its officers. Upon the basis of the preferences thus awarded, and the demerit, the Commission had remaining for final comparison three applicants—Federal, Flower and Community. It preferred Flower to Federal because of the latter's existing radio stations. It preferred Flower to Community because of Flower's superiority in participation in station operation (*i.e.*, integration of ownership and management). It found this superiority not because the owners of Flower planned a greater amount of participation in its management but because they were much more and better experienced than were the owner-managers of Community. A reading of the detailed findings concerning the experience of each of the people involved shows clearly the grounds upon which the Commission made this finding.[7] We must keep in mind that we are not choosing a grantee. Our function has been described many times: We must understand the processes pursued by the Commission and test the validity of both the process and the conclusion.

We find no fault necessitating reversal.

Affirmed.

---

[7] The findings as to the personnel of Flower involved in this problem will be found in the *Flower City Television* decision, *supra* note 1, at 269, those of Community at 295, and those of Citizens at 322.

LEVENTHAL, *Circuit Judge, dissenting:* In view of all the time that has elapsed and paper that has been lodged, it is with some diffidence that I demur from this court's affirmance of the award by the Federal Communications Commission to Flower City Television Corporation (Flower) of the license for TV Channel 13, Rochester, New York. But I think the findings fail to support the order, in that the Commission failed to set forth its reasons for preferring Flower to Community Broadcasting Company (Community) and Citizens Broadcasting Company (Citizens). In my view sound principles of administrative law and judicial review require remand to the Commission.

I

It was in August 1961 that Channel 13, a VHF channel, was assigned to the area of Rochester, New York, sometimes called the Flower City. After applications to operate the channel were duly filed, a comparative hearing began in June 1962. It ended in December 1962. In January 1964 the Hearing Examiner filed an Initial Decision which included extensive findings. Without commenting on the qualifications of each applicant, except to note them, the Examiner, persuaded by the advantage of establishing an educational broadcast service in the area, decided upon an award to Rochester Area Educational Television Association, Inc. (RAETA) and Rochester Telecasters, Inc.[1]

On the basis of exceptions from other applicants, and an objection filed in amicus form by ABC, the Commission in May 1965 entered an order that reopened the record to explore, *inter alia*, the impact of a possible grant to RAETA on the objective of a competitive third network serv-

[1] These two applicants had proposed a share-time operation of channel 13 and their applications were treated as a single proposal. RAETA was to use the channel as a non-commercial educational station, and RTI was to use the balance of the time as a commercial ABC network affiliate.

ice.[2] At the same time each applicant was given the opportunity of bringing its application up to date to reflect involuntary changes and programming changes occasioned by changed needs of the community. The applicants entered into a series of negotiations, culminating in RAETA's withdrawal of its application.[3]

Meanwhile, on July 28, 1965, the FCC issued its *Policy Statement on Comparative Broadcast Hearings.*[4] On the withdrawal of RAETA the Commission determined that the instant proceeding could be decided on the basis of the record before the Examiner without further evidentiary submission and it vacated the remand. A second oral argument was held before the Commission on May 22, 1967, affording the parties another opportunity to focus on the relevant points in the record. The parties did not object to this procedure.

In making the award to Flower on August 3, 1967, five years after the hearing, the Commission adopted the Examiner's findings of fact but said that in view of RAETA's withdrawal "it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result."[5]

The Commission's opinion undertook to apply the criteria of its 1965 Policy Statement which set forth the criteria governing comparative hearings in regard to all fu-

---

[2] Memoranda opinions and Order, FCC 65-403, released May 13, 1965.

[3] RAETA now operates Station WXXI in Rochester, a UHF educational channel.

[4] 1 F.C.C. 2d 393 (1965).

[5] *Decision,* August 3, 1967, Application of Flower City Television Corp., FCC 67-924, 9 F.C.C. 2d 249, at 252. Reconsideration was denied by Memorandum Opinion and Order, 10 F.C.C. 2d 718 (Nov. 22, 1967). Commissioner Bartley and Commissioner Johnson dissented separately.

ture licensing orders.[6] Under three of the categories of criteria the Commission found explicitly that as between Flower, Community, and Citizens, none of them should be ranked preferentially. In connection with *Past Broadcast Record* Community was singled out for preference because of its "commendable record." In the area of *Participation in Station Operation by Owners,* Flower was ranked second after Federal. Flower's relatively high ranking here turned out to be crucial. The Commission concluded that the award should go to Flower despite Community's edge in *Past Broadcast Record.*

While the record suffices to show that Flower seems to be a satisfactory licensee, I think a remand is required because the Commission has failed adequately to justify its preference for the experience of Flower's participating owners, as opposed to that of the principals of Citizens and Community.

II

This court has consistently insisted on adequate findings and explanation in support of administrative decisions. In a careful opinion the court set forth the relevant criteria, with specific reference to the requirements for findings issued after comparative hearings:[7]

> (1) The bases or reasons for final conclusions must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found

---

[6] The categories are: *Diversification and Control of Media of Mass Communications; Full-Time Participation in Station Operation by Owners; Proposed Program Service; Past Broadcast Record; Efficient Use of Frequency; Character; Other Criteria.*

[7] Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949).

must appear as rational inferences from the findings of basic fact. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

The Commission's findings do set forth the bare bones facts of the nature and extent of the broadcast experience of the principals involved.[8] What is lacking is the critical

---

[8] These findings, set forth in the Examiner's findings of fact, and adopted by the Commission may be summarized as follows:

FLOWER 9 F.C.C. 2d at 268-69.

Larson: 1926 - announcer and program director at Salt Lake City radio station; 1929 - producer-director for NBC radio network in New York; 1934 - independent radio producer; 1942 - 20% owner and general manager of District of Columbia radio station; 1945 - vice president and general manager for radio and television operations of the Philadelphia Bulletin; supervised application for and construction of Philadelphia TV station while television operations supervisor for Philadelphia Bulletin; 1953-1959 - President, general manager, and 20% owner of Salt Lake City radio-TV station.

Auchincloss: 1934 (at age 17) - summer job as announcer for Asbury Park radio station. Since 1943, he has been an independent writer, director, and producer in radio, television, and other fields.

CITIZENS 9 F.C.C. 2d at 322-25.

Fay: 1927 - studio manager at Buffalo radio station; 1928-1957 - general manager and officer of Rochester radio-TV station (TV since 1949).

Fraiberg: 1949 - sales manager and programming for San Francisco TV station; 1959 - assistant to vice president in

feature of justification or analysis explaining why the Commission deemed the background of Flower's executives to be preferable.

I do not for a moment suggest that the Commission must dot every "i" and cross every "t" in its conclusions. It is enough if a court can "discern the path" followed by the Commission.[9] And I *can* discern the path by which the Commission disposed of the applicants other than Citizens and Community. The Commission's reasons for rejecting Federal, Genesee and Heritage on grounds other than broadcast experience were amply stated, based on considerations that were within the purview of the Policy Statement, and supported by the record. As to Star, Main and RTI, the Examiner's basic findings make it reasonably clear to me that these applicants were substantially deficient in television broadcast experience as compared with Flower, Citizens or Community.

Agencies should not be compelled to labor the obvious.[10] Certainly the Commission is not required to formulate a comparison between each pair of applicants for each cri-

---

charge of television, Metropolitan Broadcasting Co. (Metromedia); 1963 - general manager of District of Columbia television station (now manager of WNEW-TV in New York).

COMMUNITY 9 F.C.C. 2d at 295-301.

Greene: 1934 - account executive of Buffalo radio stations; 1946 - national sales manager for Buffalo radio station; 1953 - assistant general manager of Buffalo radio station; co-owner of radio stations in North Carolina and Colorado; 1956 - co-owner and general manager of Rochester radio station.

Hanna: 1940-present - general manager of Cornell University AM-FM radio station.

[9] *See* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945).

[10] See my dissent in MG-TV Broadcasting Co. v. FCC, D.C. Cir. No. 21224, Dec. 20, 1968.

terion. A certain summariness of treatment is acceptable and necessary for relatively insubstantial matters. I do not quarrel with Judge Prettyman's observation in that context.

When we come to the issue of prior broadcast experience, however, we are manifestly concerned with a critical aspect of the hearing and decisional process, and the Commission cannot rely on bare conclusions without supporting findings unless the existence and content of those findings are virtually manifest.

Flower was rated superior in "participation in station operation by owners" to all applicants other than Federal (which was downgraded on the diversification criterion). What was the basis of that preferential rating? To borrow Commissioner Bartley's words, the Commission's decision virtually admits that "the fact that most of the Flower stock is held by persons with area familiarity and by persons who will devote some time to the operation of the station is also true of most of the other applicants."[11] The majority of this court accordingly projects that Flower's preference on this criterion rests not on a greater amount of owner participation in management, but on the fact that Flower's owner-managers were much more and better experienced than those of the other applicants.

Let us begin by comparing Flower and Citizens—reserving discussion of Community because that involves still another serious problem with the findings. All the Commission says is: "Among the other parties with substantial integration, Flower ranks the highest, in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser experience of Gordon Auchincloss II."[12]

---

[11] 9 F.C.C. 2d at 261.

[12] 9 F.C.C. 2d at 254.

If the Commission had stated why it preferred Flower's principals to Citizens' in regard to experience, I might be able to say—yes, those reasons are supported by the record and they seem reasonable. But in the absence of such comparative findings by the Commission, the Commission's reasons for preferring Flower are neither obvious nor "discernible" so far as I am concerned, even after attentive study of the evidentiary findings.

The evidentiary findings do show that Flower's principals had extensive broadcast experience. Flower's proposed general manager, Larson, had started in radio in 1926 and had remained in the commercial communications field until 1958. His most recent experience had been as president, stockholder, and general manager of a Salt Lake City radio and television station. The proposed program director, Auchincloss, had been a writer, director, and producer in television, radio and other fields since 1943.

However, the principals of Citizens likewise had extensive television broadcast experience on which the Commission failed to comment. Fay began in radio in 1927 and had been continually engaged as an officer and general manager of a *Rochester* radio and television station until 1957. Fraiberg began his television career in 1949, had been general manager of two television stations, and was still employed as a general manager when the Commission made its award. It is significant, moreover, that his experience embraced management of a TV station in a large metropolis.

It is possible that, for reasons undiscernible by me, the Commission could reasonably have concluded, *e.g.*, that Larson's background as a producer is more significant than Fraiberg's executive experience (though *a priori* I would have supposed exactly the reverse), or that Larson and Auchincloss make a better "team" than Fraiberg and Fay, or have associations of better quality. Any such conclusion with supporting evidentiary findings might have been an

acceptable ground for decision. But the Commission put forth only a peremptory conclusion which, in my view, was not adequately supported.

Turning now to Community, there is applicable here, *pari passu*, all that I have noted in discussion of Citizens with regard to the gaps in the findings, and the lack of reasoned judgment and analysis as to comparative experience of Messrs. Greene and Hanna.

But there is more, for Community was entitled to a credit for its past broadcast record. The significance of this is heightened by the Commission's determination, in line with the express comment in the Policy Statement, that no such credit is available for average performance, a standard that led to the denial of a preference to Star or Federal on this point. What is required is "such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record." (9 F.C.C. 2d at 255). Community met this test. The Commission said: "Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station." And after recounting some aspects of that station's outstanding performance the Commission said: "In view of the facts that Greene was general manager and an owner of WHAM during this period and that Greene proposes to be in an active full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it." (9 F.C.C. 2d at 253).

Because of this factor, Commissioner Johnson would have given the award to Community. That is of course not decisive. But it suggests that more was required than was provided by the Commission when it summarily said: "We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This

superiority arises from the experience factor." (9 F.C.C. 2d at 256).[13] When executives responsible for an outstanding past broadcast record are given a relatively low rating on ground of comparative broadcast experience, there would seem to be a situation which may possibly exist[14] but should not be asserted in the absence of reasoned comment and explanation. No such comparative comment was provided here.

There may be a clue to what the Commission had in mind in its concluding remark: "We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50-percent owner of the station whose record is involved." (9 F.C.C. 2d at 257). This was reiterated on rehearing. (10 F.C.C. 2d at 719).

This seems to be a distortion of a more meaningful admonition in the *Policy Statement:*

> If a past record warrants consideration, the particular reasons, if any, which may have accounted for that

---

[13] The Commission also said (pp. 256-257): "(We note that Community's participating stockholders also lack area familiarity)." The use of parentheses reinforces the text in indicating this was a make-weight. The evidentiary findings make clear that while Flower has stockholders familiar with the Rochester area, none of them plan full-time participation in station affairs. In the Policy Statement the Commission said that only a "slight credit" would be given for local residence of persons with ownership interests who will devote "some time" but "cannot be considered as actively participating in station affairs on a substantially full-time basis." (1 F.C.C. 2d at 396).

[14] *E.g.*, there may be newcomers whose experience will be taken into account in assessing participation by owners even though their prior activity "would not qualify as a past broadcast record, *i.e.*, where there was not ownership responsibility for a station's performance." *See* 1 F.C.C. 2d at 396.

> record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.[15]

Is the Commission saying that a 15 percent interest in the TV station was insufficient incentive to bring forth the ability and acumen that resulted in the outstanding record of Greene's station? It should be noted that Larson's interest is only 10 percent, and Auchincloss's is only 8.33 percent. Whatever the rationale, if any, for discounting Community's past record, the court ought not have to grope for the policy the Commission sought to further. *See Radio Station KFH Co.* v. *FCC*, 101 U.S. App. D.C. 164, 247 F.2d 570 (1957).

III

While a hearing examiner who has "lived with a case"[16] might have based a conclusion on the presence and acumen displayed by the various principals during the hearings, the Commission decided without the benefit of any pertinent examiner recommendation. I do not say the Commission necessarily erred in proceeding without further evidentiary hearings. However, its task was made more difficult by the lack of evidentiary findings of an examiner (or intermediate decision of a review board) purposefully addressed to the pending applicants. The Commission's obligation to provide findings meaningfully related to its result was enlarged accordingly.

---

[15] 1 F.C.C. 2d at 398.

[16] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to "demerits" in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes[17] concerning intuition that outruns analysis.

The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise.

I for one would be prepared to sustain an action presented with such candor, but pause in saying that, to note that such a candid disclaimer would perhaps crystallize other and more acceptable solutions. Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the opportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmis-

---

[17] Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).

sible means of deciding the undecidable, provided the ground rules are known in advance.[18]

But all that is by the way, or perhaps for another day. In the case before us the Commission did not throw up its hands, so to speak. It purported to act in terms of reason, and I at least do not feel that I know the reason. "The administrative process will best be vindicated by clarity in its exercise."[19] I have general faith, notwithstanding some previous observations, that the public interest is best served by insisting that those who hold the trust of public office discharge their function with a conscientious statement of reasons, at least in matters adjudicated upon formal submission in an adversary process. This promotes confidence that decisions are unbiased and not arbitrary.[20] The requirement of findings and explanations, which are intended to assure neutrality and rationality, is enshrined in the core of our administrative law and the Administrative Procedure Act.[21] It should not be eroded with lip service.

---

[18] For example, lot has been used for selection of bonds for redemption; designating location of candidates on an election ballot; designating which of the newly elected members of a body (*e.g.*, D.C. School Board elected in 1968) shall have a 1-year and which a 3-year term. Examples could readily be multiplied. Judicial machinery makes deliberate use of chance in selection of representative juries.

[19] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

[20] *Compare* J. Frank, "Law and the Modern Mind" (New York, 1963). The need to state reasons in opinions helps to eliminate irrelevant prejudice and arbitrary decisions, and may also force a trier of fact and law to grapple with unconscious preferences, and to articulate and place in perspective the preferences that shape his decisions.

[21] *See* section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (Supp. III, 1968).

IV

A final word on the role of the court in relation to the administrative process is here appropriate to place my dissent in perspective. I have already noted that a court should be sensitive to the demands on the time of busy administrators, that it is unrealistic to require or expect dotted "i's" and crossed "t's," that it is enough to be able to "discern" the "path" followed by the administrator even when a decision leaves something to be desired.[22]

Yet the judiciary must not abdicate its function of enforcing substantive and procedural requirements, what Professor Jaffe calls the "supervisory" function.[23] For the moment at least the Rochester public is being served in terms of service.[24] In the long run, the general public will benefit from attentive judicial insistence on the essentials of the administrative process. Insistence on articulated reasons helps assure that our agencies are selecting those licensees who will best serve the public, and in a broader sense, enables the public to repose confidence in the judgment of its decision-makers. I would remand for further consideration and findings.

---

[22] *See* Colorado Interstate Gas Co. v. FPC, *supra* note 10; MG-TV Broadcasting Co. v. FCC, *supra*, note 10 (dissenting opinion).

[23] *See* Jaffe, "Judicial Control of Administrative Action" at 589 (1965): ". . . the effectiveness of judicial supervision should be judged not only in terms of the case which correction was administered, but in its effect on doctrine in the long run."

[24] At this time an interim sharing operation is in effect whereby the competing broadcast groups are jointly managing the station. While these enforced joint ventures often do not prosper because no one participant feels it has a long-term commitment to the success of the enterprise, in this instance the participants are working harmoniously and the effort is flourishing.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

On Consideration Thereof, It is ordered and adjudged by this Court that the Decision and Memorandum Opinion and Order of the Federal Communications Commission appealed from in these cases be, and they are hereby, affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Nathan J. Paulson
Clerk

Dated: January 30, 1969.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D. C. 20001

April 1, 1969

Nos. 21,277 & 21,541-21,547—*Star Television, Inc.* v. *F.C.C.*

Gentlemen:

Enclosed is a copy of the order denying your petition for rehearing. Your suggestion that this case be reheard *en banc* was transmitted to the full Court, and the purpose of this letter is to inform you that there not being a majority of the judges in regular active service in favor of having this case reheard *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

NATHAN J. PAULSON
Nathan J. Paulson, Clerk

By: ALEXANDER L. STEVAS
Alexander L. Stevas
Chief Deputy Clerk

ALS/gb
Encl.

Order

On consideration of appellants' petitions for rehearing in Nos. 21,277, 21,541, 21,542, 21,543, 21,544 and 21,546, it is

ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam.

Circuit Judge Leventhal would grant appellants' petitions for rehearing.

APPENDIX E

Communications Act of 1934

"Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act." [47 U.S.C. § 301.]

Section 303. "Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

* * * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." [47 U.S.C. § 303(r).]

Section 307. "(a) The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act." [42 U.S.C. § 307(a).]

Section 309. "(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies,

whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application." [47 U.S.C. § 309(a).]

* * * * *

"(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. . . . Any hearng subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. . . ." [47 U.S.C. § 309(e).]

Section 402. "(a) Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in Public Law 901, Eighty-first Congress, approved December 29, 1950.

"(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit or station license, whose application is denied by the Commission." [47 U.S.C. § 402(a), (b)(1).]

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 29 1969
JOHN F. DAVIS, CLERK

No. 532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BENEDICT P. COTTONE
JOHN C. ELDRIDGE
1730 M Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners

Of Counsel:

FLY, SHUEBRUK, BLUME & GAUGINE
30 Rockefeller Plaza
New York, New York

WELCH & MORGAN
900 17th Street, N. W.
Washington, D. C.

WILNER, SCHEINER & GREELEY
1343 H Street, N. W.
Washington, D. C.

MULLIN & CONNOR
805 15th Street, N. W.
Washington, D. C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	12
Conclusion	24

Appendix A	1a
Appendix B	24a
Appendix C	31a
Opinion of the Court Below	31a
Judgment	50a
Appendix D	51a

INDEX TO CITATIONS

CASES:

Channel Assignment in Rochester, New York, 21 R.R. 1748a	5
City of Camden, 18 F.C.C. 2d 412	19
Flower City Television Corp., 9 F.C.C. 2d 249, 10 R.R. 2d 1059, reconsideration denied 10 F.C.C. 2d 718, 11 R.R. 2d 771 (1967)	3, 6, 9, 10, 15, 18, 20
Hensy v. *F.C.C.*, 302 F. 2d 191 (C.A.D.C.), cert. denied 371 U.S. 821	17
Integrated Communication Systems, Inc., of Massachusetts, 3 R.R. 2d 557	17-18
Johnston Broadcasting Co. v. *F.C.C.*, 175 F. 2d 351 (C.A.D.C.)	17

Page

Minshall Broadcasting Co., 11 F.C.C. 2d 796 19
National Broadcasting Co. v. *United States*, 319 U.S. 190 ..... 4, 13, 20
Pinellas Broadcasting Co. v. *F.C.C.*, 230 F. 2d 204 (C.A.D.C.), cert. denied 350 U.S. 1007 17
Plains Radio Broadcasting Co. v. *F.C.C.*, 175 F. 2d 359 (C.A.D.C.) 17, 21
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 ..... 7, 8, 9, 10, 12, 14, 15, 16, 17, 18, 19
Radio Station KFH v. *F.C.C.*, 247 F. 2d 570 (C.A.D.C.) 21
Red Lion Broadcasting Co., Inc. v. *F.C.C.*, — U.S. —, 37 L.W. 4509 ..... 13, 17
Rollins Broadcasting, Inc., 20 R.R. 976 17
Vernon Broadcasting Co., 12 F.C.C. 2d 946 19

STATUTES:

5 U.S.C. 557 (c) 3, 21

28 U.S.C. 1254 (1) 2

OTHER:

Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1055 (1962) 12, 14, 21

Landis, *Report on Regulatory Agencies to the President-Elect*; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959) ... 12, 21

Levin, *Regulatory Efficiency, Reform, and the F.C.C.*, 50 Geo. L.J. 1 (1961) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Star Television, Inc., Community Broadcasting, Inc., Citizens Television Corp., Heritage Radio and Television Broadcasting Co., Inc., and Main Broadcasting Co., Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the Federal Communications Commission (App. A, *infra,* pp. 1-23) are reported at 9 F.C.C. 2d 249 and at 10 R. R. 2d 1059.[1] The opinions of the Federal Communications Commission on petitions for reconsideration (App. B, *infra,* pp. 24-30) are reported at 10 F.C.C. 2d 718 and at 11 R. R. 2d 771. The opinions of the court of appeals (App. C, *infra,* pp. 32-49) are not yet reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra,* p. 50) was entered on January 30, 1969. The order of the court of appeals (App. D, *infra,* p. 51) denying petitioners' timely filed petitions for rehearing was entered April 1, 1969. By order of the Chief Justice entered on June 20, 1969, and by order of Mr. Justice Marshall entered on July 29, 1969, the time for filing a petition for a writ of certiorari was extended to and including August 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has, with respect to this as well as other comparative licensing proceedings, failed to comply with its statutory mandate by not developing a rational approach to comparative cases which it then applies and adheres to in particular cases; and specifically, whether the instant decision was arbitrary and not in accordance with the statute because of the Commission's unexplained failure to adhere to the policy standards

---

[1] "App." refers to the Appendix to this petition. "R.R." refers to the volumes of Pike & Fischer Radio Regulation.

which the Commission had announced would apply to this proceeding.

2. Whether the Federal Communications Commission's decision in this case complied with the requirement of the Administrative Procedure Act, 5 U.S.C. 557(c), that all decisions shall include "the reasons or basis" for the agency's findings and conclusions.

STATUTES INVOLVED

Sections 307(a), 308(a) and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. 307(a), 308 and 309(a), provide in pertinent part:

> 307(a). The Commission, if public convenience, interest or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.
>
> 308(a). The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it * * *.
>
> (b). All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownerhip and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *.
>
> 309(a). Subject to the provisions of this section, the Commission shall determine, in the case

of each application filed with it to which section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

STATEMENT

1. Section 307(a) of the Communications Act of 1934 provides that the Federal Communications Commission "shall grant to any applicant therefor a station license provided for by this Act" if such grant will serve the "public convenience, interest or necessity." Section 308 of the Act provides for the grant of construction permits and station licenses and further provides that applications for such permits and licenses shall contain whatever facts concerning the character and financial, technical, and other qualifications of the application to operate a station as the Commission may prescribe. Section 309(a) of the Act reiterates that the Commission shall grant applications filed under Section 308 if it "shall find that the public interest, convenience, and necessity would be served * * *."

However, as this Court pointed out in *Nat. Broadcasting Co.* v. *United States,* 319 U.S. 190, 216-217, the statutory criterion of "public interest, convenience, and necessity" is not limited to the financial and technical qualifications of applicants for station permits and licenses, as such limitation would not enable the Commission to "choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate" a broadcast facility. Instead, as this Court went on to hold, "comparative con-

siderations as to the services to be rendered" govern the application of the "public interest, convenience or necessity" standard (319 U.S. at 217). The present case is of this nature, involving several financially and technically qualified applicants for a single broadcast facility, and the issues concern the manner in which the Commission has applied the governing criterion of "comparative considerations as to the services to be rendered."

2. In 1961, the Federal Communications Commission assigned a third VHF television channel, channel 13, to Rochester, New York,[2] and later the same year twelve applications for a construction permit for the new channel were filed, including the applications of the five petitioners herein and of the respondent Flower City Television Corporation (App. 33a). The applications were mutually exclusive, except for two which together proposed a share-time operation on channel 13 (App. 1, 33).[3] The Commission designated the applications for a consolidated comparative hearing, which began in June 1962 and ended in December 1962 (App. 37).[4]

In January 1964, the Commission's Hearing Examiner filed a 270 page initial decision, in which the

---

[2] *Channel Assignment in Rochester, New York*, 21 R.R. 1748a.

[3] These were the applications of Rochester Area Educational Television (RAETA) and Rochester Telecasters, Inc. (RTI). Their proposal was that RAETA would use the channel part of each day as a non-commercial, educational station while RTI would use it during the remaining hours as a commercial station affiliated with the ABC Television Network. Each of the other applicants also proposed an ABC affiliation (App. 1-2, 37).

[4] Two of the original twelve candidates failed to press their applications at the hearing.

Examiner concluded that the share-time applications of RAETA and RTI for the construction permit should be granted because of the need for an educational broadcast service in the area (App. 1, 37).[5] The Examiner's decision recited the basic facts concerning each of the ten candidates which had pressed their applications for the channel, such as the residence, background and civic activities of the principals, the extent to which the stockholders of each would participate in station management, etc., and the Examiner found that each of these applicants was technically and financially qualified. The Examiner also made ultimate findings and conclusions comparing the successful share-time applicants (RAETA and RTI) with the other eight applicants as to various comparative criteria, denominated by the Examiner as: "area familiarity"; "integration of ownership and management"; "broadcast experience"; "diversification of control of mass media of communications"; "past performance records"; "preparation"; "programs"; and "other matters" (9 F.C.C. 2d 521-532). The Examiner, however, made no findings or conclusions comparing the eight unsuccessful contesting applicants with each other with respect to these criteria or comparing their qualifications in any other respects (App. 37; 9 F.C.C. 2d 521-532).

After the filing of exceptions to the Hearing Examiner's decision and oral argument before the Commission, the Commission in May 1965 remanded the proceeding for a further hearing so that more evidence could be adduced on certain questions (App. 2, 37-38). Before the second hearing was held, two events oc-

[5] The Hearing Examiner's decision is reported at 9 F.C.C. 2d 264-534.

curred. First, the Commission in July 1965 promulgated (with some dissent) a *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, in which the Commission formally set forth the criteria which purportedly would govern comparative proceedings (App. 38). The criteria were divided into the seven categories called: Diversification and Control of Media of Mass Communications; Full-Time Participation in Station Operation by Owners; Proposed Program Service; Past Broadcast Record; Efficient Use of Frequency; Character; and Other Factors (App. 39; 1 F.C.C. 2d 394-399).[6] The Commission stated that the *Policy Statement* would be applied to pending cases (App. 3; 1 F.C.C. 2d 399-400).

The second event which occurred after the remand order in this case, was the voluntary withdrawal of the successful applicant RAETA (App. 3, 38). RAETA then applied for and is now operating a full-time UHF educational station in Rochester (App. 3, 38).

The Commission, stating that in view of the *Policy Statement* and the withdrawal of RAETA's application no useful purpose would be served by a second hearing, in April 1966 set aside its remand order (App.

---

[6] These criteria had for the most part been previously enunciated by the Commission in deciding cases; and the *Policy Statement* was largely a formal restatement of old criteria. However, the *Policy Statement* did represent some revision of prior pronouncements. Under the *Policy Statement,* such factors as "previous broadcast experience" and "local residence" of owners, were deemed mere aspects of the criterion "Full-Time Participation in Station Operation by Owners," whereas prior to that time they had been regarded separately. In addition, the *Policy Statement* changed ostensible Commission policies as to the weight to be given certain criteria.

4). More than a year later further oral argument was held before the Commission, and in August 1967 the Commission rendered a 3-2 decision awarding the channel to the respondent Flower City Television Corporation (Flower) (App. 1-23).

In making its award, the Commission purported to apply its recently promulgated *Policy Statement.* With respect to the first comparative criteria listed in the *Policy Statement,* denominated "Diversification of Control of the Media of Mass Communications," the Commission found that only one applicant, The Federal Broadcasting System, Inc., should be given a disqualifying demerit because of its ownership and its 100 percent stockholder's ownership of other broadcast facilities in the Rochester area (App. 8-9).[7] The Commission in its opinion further stated that, apart from the "Diversification" factor, only two other important criteria were involved in this case, namely "Participation in Station Operation by Owners" and "Past Broadcast Record" (App. 13). As to the latter criterion, the Commission found that the only applicant entitled to a preference because of a past broadcast record was the petitioner Community Broadcasting, Inc. (App. 11).[8] This was because one of Com-

[7] Federal has filed a separate petition for a writ of certiorari, challenging the court of appeals' affirmance of the Commission's decision.

[8] The Commission in its *Policy Statement* defined "Past Broadcast Record" as "past ownership interests and significant participation in a broadcast station by one with an ownership interest in the applicant. It is a factor of substantial importance * * *." 1 F.C.C. 2d at 398. This factor should be distinguished from the phrase "broadcast experience" as used in the Commission's jargon. When the Commission regards an owner of an applicant as having "broadcast experience," it does not require that the past experience be also as an owner.

munity's owners, who would be active in a full-time supervisory capacity in Community's proposed station, had earlier been a fifty percent stockholder and general manager of a Rochester station which, during his tenure there, had a "commendable record of performance" (App. 11-12).

Turning to the remaining criterion which it deemed to be involved in this case, the Commission had earlier said in its *Policy Statement* that "Full-Time Participation in Station Operation by Owners" was a factor of "substantial" importance; that the Commission was "primarily interested in full-time" participation; that attributes of participating owners such as their experience and local residence will be considered but that prior experience is "not so significant as local residence" (1 F.C.C. 2d at 395-396). Despite these policy pronouncements that were purportedly applicable to this case, and despite the facts that Flower proposed less full-time participation by owners than four of the five petitioners, that Flower had a smaller percentage of local residency among its stockholders than a majority of petitioners, and that Flower had a smaller percentage of owners with prior broadcast experience than a majority of the petitioners, the Commission awarded the channel to Flower on the ground that Flower stood higher than any of the petitioners on the criterion of "Full-Time Participation in Station Operation by Owners" (App. 9-10, 13-14; see also 9 F.C.C. 2d at 266-355 for the Examiner's findings on these matters). The only reason given for the Commission's conclusion that Flower out-ranked petitioners on this ground, was the statement that "Flower ranks the highest, in view of the broad broadcasting, and particularly television experience of G. Bennett

Larson [a ten percent stockholder in Flower], and of the somewhat lesser broadcast experience of Gordon Auchincloss II [an 8.33 percent stockholder in Flower]" (App. 9-10). There were no findings whatever comparing the experience of these persons to the experience of petitioners' principals or explaining why such experience may have been better (App. 9-10). Moreover, as pointed out above, the Commission's *Policy Statement* had relegated previous broadcast experience to a secondary role under the criteria "Full-Time Participation in Station Operation by Owners" (1 F.C.C. 2d at 396), and one of the petitioners had been given a credit for a "commendable" past broadcast record (App. 11-12).

Finally, the Commission in this case not only designated an issue calling for a comparison of the various program proposals, but also inserted a special issue as to whether there are kinds of programming for which there is an "unfulfilled need" in the Rochester area and the extent to which each applicant "would meet such needs." (9 F.C.C. 2d at 265, paragraph 6(d)). The Commission in its decision stated that the withdrawal of RAETA's application rendered this issue "moot." (App. 4a).[9]

Two Commissioners dissented from the decision, with Commissioner Bartley stating that he would have awarded the channel to Federal (App. 19-21) and Commissioner Johnson expressing a preference for Community (App. 21-23). The basic thrust of Commissioner Johnson's dissent, however, was that the Com-

---

[9] This occurred despite the fact that questions had been raised on the record concerning serious deficiencies in Flower's program planning. Admittedly, Flower had prepared its proposed program proposals prior to conducting any study, survey or investigation of community needs. RAETA's application obviously had nothing whatever to do with such deficiencies.

mission's present comparative hearing process "is a thoroughly unsatisfactory way to award valuable broadcast properties" and that "[n]o better example could be chosen to demonstrate this than the case which the Commission decides today" (App. 21). His dissent went on to refer to the "intolerable" delay accompanying the comparative process and the fact that "the extraordinary marathon conducted by the Commission and the applicants has produced no more satisfactory result than would a drawing from a hat" (App. 21-22).

After the Commission denied petitions for reconsideration (App. 24-30), a divided court of appeals in January 1969 affirmed the Commission's decision (App. 32-49). The majority decision, while acknowledging that the Commission's reasoning "may be a bit circuitous" (App. 34), nevertheless believed that its reading of the Hearing Examiner's basic findings respecting the broadcast experience of the various applicants' owner-managers showed the reason for the Commission's decision (App. 35). Judge Leventhal dissented on the ground that the Commission's findings and conclusions failed to reveal why it selected Flower (App. 37-49). The dissenting opinion pointed up the problem of the Commission's basic approach to comparative cases, raising the questions of whether the Commission can develop meaningful reasons for selecting one of several qualified applicants for a single facility, whether the Commission should rely on intuition, whether after narrowing down the field to the reasonably qualified applicants it should conduct "run-off" proceedings, or whether a lottery should be used (App. 47-48). Judge Leventhal concluded that where, as here, the Commission "purported to act in terms of reason," a reviewing court should be able to ascertain the reasoning (App. 48).

REASONS FOR GRANTING THE WRIT

The decisions below present three important and related matters of federal administrative law under the Communications Act of 1934, which have been recurring over the years, and which have not been, but should be, considered by this Court. The first of these is the Federal Communications Commission's failure to develop a rational approach to comparative licensing proceedings which it then applies to specific cases with some degree of consistency. This issue is highlighted by the instant case, for the Commission promulgated a "*Policy Statement*" for comparative cases during the pendency of this proceeding, purported to apply that *Policy Statement* to this case, but instead completely departed from the *Policy Statement* in its decision. This inability of the Commission to develop some consistently applied rationale in comparative broadcast proceedings has been dealt with by commentators over the years;[10] it is certainly a matter that is ripe for consideration by this Court. The second matter presented by this case is the total absence of satisfactory reasons given by the Commission for its decision. The plain language of the Administrative Procedure Act, as well as the decisions of the courts, require that the "reasons or basis" for an administrative agency's conclusions be given by the agency. However, as Judge Leventhal noted in his dissent below, "the Commission's reasons for preferring Flower are neither obvious nor 'discernible' * * *" (App. 43). The failure of

---

[10] See, *e.g.*, Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 1055 (1962); Levin, *Regulatory Efficiency, Reform and the FCC*, 50 Geo. L.J. 1 (1961); Landis, *Report on Regulatory Agencies to the President-Elect*; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 Geo. L.J. 655 (1959).

the court of appeals to insist that the Commission articulate reasons for its decision negates the value of judicial review in comparative licensing cases. Of particular concern is the refusal of the Commission even to consider substantial evidence as to the "unfulfilled needs" of the Rochester area for particular kinds of programming, although it designated a special issue in the hearing calling for such an inquiry.

1. This Court has several times emphasized that the statutory standard of "public interest, convenience or necessity" which the FCC must use in determining which of several competing applicants should be awarded a license to use a single broadcast facility, is a broad standard. Congress did not prescribe more specific guidelines but vested in the Commission the duty and authority to develop a rational method for carrying out the statutory standard. *Nat. Broadcasting Co.* v. *United States*, 319 U.S. 190, 219; *Red Lion Broadcasting Co., Inc.* v. *Federal Communications Commission*, ... U.S. ..., 37 L.W. 4509, 4513. Consequently, we assume for present purposes that the Commission could have chosen to utilize various bases in deciding which applicant should receive a particular broadcast license. Perhaps after narrowing a group of applicants to those technically and financially qualified to operate a facility, and who could be expected to operate it in the public interest, the Commission could select the winner by lot, or by intuition, or employ a bid system. Such possibilities were suggested by the dissenting opinions below and have been recommended by critics of the comparative process.

Neverthelss, the Commission has at no time expressly adopted any of the above-mentioned methods for resolving comparative cases. Instead, it has purported

to apply several specified criteria to the qualified applicants for a broadcast facility in order to determine which one is the best qualified to operate it in the public interest. The criteria, and the manner of applying them, are now embodied in the Commission's *Policy Statement*. However, as an examination of the decision in the instant case demonstrates, the Commission in fact appears to employ intuition or something other than the announced basis for selecting the licensee. The present decision is flatly inconsistent with the announced principles. Thus, the vice of the FCC's comparative process is not the Commission's failure to promulgate a presumably rational basis for deciding comparative cases; instead, the Commission's breach of its statutory duty stems from its failure to promulgate a rational basis for comparative cases which it in fact applies and adheres to in particular cases.[11]

---

[11] Petitioners do not suggest that the Commission cannot periodically make changes in its declared policies, either by subsequent policy statements or in the course of the decisional process. However, petitioners do maintain that the Commission cannot, consistent with its statutory duty, change a particular policy while purporting to apply that policy and without giving any explanation for its inconsistency. The point was made by Judge Friendly who, after reviewing several FCC comparative cases in which the Commission changed its position with respect to certain criteria, went on to say:

> "What gives concern is the manner, alas not atypical of the agencies, in which this change was made—slipped into an opinion in such a way that only careful readers would even know what had happened, without articulation of reasons, and with the prior authorities not overruled, so that the opinion writers remain free to pull them out of the drawer whenever the agency wishes to reach a result supportable by the old rule but not the new."

Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards*, 75 Harv. L. Rev. 1055, 1064 (1962).

The FCC's departure in this case from its *Policy Statement,* is manifest. For example, the second listed criterion in the *Policy Statement* (and the criterion which the Commission invoked as the ground for warding the channel to Flower) was "Full-Time Participation in Station Operation by Owners," 1 F.C.C. 2d at 395. Persons holding only 18.33 percent of Flower's stock intended to devote full-time to the station. However, with respect to the petitioners Main Broadcasting Co., Inc. (Main), Star Television, Inc. (Star), Community Broadcasting, Inc. (Community), and Citizens Television Corp. (Citizens), the percentages are, respectively, 50 percent, 37 percent, 29 percent and 23 percent (9 F.C.C. 2d at 252-253, 266-339). In the *Policy Statement* under this same "Participation" criterion, the Commission also indicated that (1) it would look to see if the participating owners had positions of responsibility in the station, (2) it would give preferential consideration to local residence of owners, and (3) it would consider the previous broadcast experience of owners, although "[p]revious broadcast experience [is] not so significant as local residence" (1 F.C.C. 2d at 395-396). With respect to the first factor, all of the petitioners as well as Flower contemplated high-level positions for the participating owners (9 F.C.C. 2d 266-339). As to local residency of participating owners, Flower was excelled by a majority of the petitioners regardless of whether only full-time participation or both full and part-time are looked to (*Ibid.*). Heritage, for example, with substantial part-time participation, exceeded Flower in resident ownership by community leaders. Regarding the previous broadcast experience of participating owners, the owner-managers of Flower owned 18.33 percent of its stock

whereas the owner-managers of petitioner Star held 37 percent, of petitioner Community 29 percent, and of petitioner Citizens 23 percent (*Ibid.*). It is also noteworthy that among the five petitioners and the respondent Flower, the only applicants with full-time owner-participants having a present residence or area familiarity with the Rochester area were petitioners Star, Citizens, Community and Main, and the only applicants with such owner-participants who had prior broadcast experience were petitioners Star, Citizens and Community (*Ibid.*).

It is obvious that in making the award to Flower on the ground of the owner-participation criterion, the FCC grossly departed from its *Policy Statement*. By relying on the bald conclusion that it preferred the experience of Flower's two participants owning only 18.33 percent of the stock (for some unexplained reason), the Commission ignored its previous announcement indicating that the primary aspect of the criteria is the degree of participation in the station by owners, and that, of the secondary aspects, previous experience is much less important than local residency (1 F.C.C. 2d at 395-396). The Commission also ignored the fact that among all applicants, the only one to receive a credit by the Commission for a commendable past broadcast record was one of the petitioners (App. 11-12).

In refusing to consider showings of the existence of "unfulfilled needs" for particular kinds of programs and the proposals of the applicants to fill those needs, the Commission went even further. This refusal is not only another example of the FCC's purporting to announce a particular policy or criterion applicable to comparative proceedings and then acting in total dis-

regard of that policy, but the Commission action is inconsistent with the "public interest" standard governing its actions, and, in this case, a violation of the due process requirement for a "fair hearing." It has long been settled that the proposed programming of competing applicants for a broadcast facility is an essential ingredient of any system to select the applicant best able to operate in the public interest. Just last term in *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* .... U.S. ...., 37 L.W. 4509, 4517, this Court stated: "In applying this standard [of public convenience, interest or necessity] the Commission for forty years has been choosing licensees based in part on their program proposals." See also *e.g., Henry* v. *F.C.C.,* 302 F. 2d 191 (C.A.D.C.), certiorari denied 371 U.S. 821; *Pinellas Broadcasting Co.* v. *Federal Communications Com'n,* 230 F. 2d 204 (C.A.D.C.), certiorari denied, 350 U.S. 1007; *Johnston Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 351, 358-359 (C.A.D.C.). The courts have reversed the Commission in comparative cases because of the lack of findings upon the applicants' program proposals, *e.g., Plains Radio Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 359, 362-363 (C.A.D.C.). In its *Policy Statement,* the third listed of the criteria was "Proposed Program Service," with the Commission saying that "decisional significance will be accorded" to substantial differences in the applicants' proposed program plans (1 F.C.C. 2d at 397). Moreover, the Commission has a policy of inquiring, in comparative hearings, whether there are presently any "unfulfilled needs" in the area to be served and the extent to which the applicants can meet such needs. *Rollins Broadcasting, Inc.,* 20 Pike and Fischer R.R. 976, 978 (F.C.C. 1960); *Integrated Communication Systems, Inc. of*

Massachusetts, 3 Pike and Fischer R.R. 2d 557 (F.C.C. 1964). Accordingly, in its designation of the applications in the present case for a comparative hearing, the FCC listed as two separate issues (1) "the programming service proposed in *each*" of the applications and (2) the programming service in each application considered in light of the types of programs for which there are unfulfilled needs in the area and the extent to which each applicant's proposals would meet such needs (9 F.C.C.2d at 265). The several applicants consequently devoted a considerable amount of time and effort at the hearing on the matter of programming, and the Hearing Examiner's basic findings relating to the programming issues take up one hundred and fifty-four pages of the initial decision (9 F.C.C. 2d at 354-508). Moreover, one or more of the petitioners had conducted comprehensive surveys of the programming needs of the Rochester area would be served, introduced evidence showing that there were certain "unfulfilled needs" for live discussion, news, educational, and other programs, and made detailed programming proposals which were geared to meet such needs, including a wide variety and large number of live discussion, news, and educational programs (9 F.C.C. 2d at 371).

In spite of the court decisions that programming is a vital ingredient of the "public interest" standard which the Commission is charged with effectuating, the *Policy Statement*, the effort of the applicants and the Hearing Examiner's findings on programming, the Commission in its decision stated somewhat incredibly that its designation of programming proposals among the issues was prompted by the presence of RAETA and that the withdrawal of RAETA's application ren-

dered the matter moot (App. 4, footnote 3). Nowhere previously, either in past decisions or in the *Policy Statement* or in the designation of issues for this case can any hint be found that proposed programming service is relevant only where one of the applicants proposes an educational broadcast facility.[12]

The inconsistencies between the Commission's *Policy Statement* and the decision in the case at bar could be dealt with in more detail. Nevertheless, the above-summary sufficiently reveals the Commission's propensity for purporting to apply certain policies to comparative cases while at the same time failing to adhere to those policies.

2. Closely related to the Commission's inability to develop a rational and consistently applied policy to comparative proceedings, is its utter failure to give reasons or explanations for particular decisions. The vice of departing from an announced policy is compounded when done without any satisfactory reasons being given. In this case, as emphasized by Judge Leventhal dissenting below, absolutely no reasons were given by the Commission for preferring the prior broadcast experience of Flower's owner-managers over that of petitioners' owner-managers. The reader of the Commission's opinion has no idea whether the Commission believed such experience to be quantitatively better, or whether it thought that such experience

---

[12] In many cases acted on during the pendency of the instant case the Commission has included disqualifying programming issues and in some, it has disqualified applicants whose program planning was less deficient than was Flower's. *City of Camden*, 18 F.C.C. 2d 412 (1969); *Minshall Broadcasting Co.*, 11 F.C.C. 2d 796 (1968); *Vernon Broadcasting Co.*, 12 F.C.C. 2d 946 (1968).

was qualitively better, or if either, for what reasons. The Commission said only that the experience of Flower's owner-managers was "broad" (App. 10). But the experience of the owner-managers of several of the petitioners was similarly "broad". The Commission's opinion contains utterly no explanation of why Mr. Larson of Flower had any broader or superior broadcasting experience than Messrs. Greene and Hanna of Community or Messrs. Fay and Fraiberg of Citizens or Mr. Forman of Star.[13]

Moreover, even if the Commission had explained why Flower's principals had broader experience, it made no findings that Flower's principals were likely to be more sensitive to Rochester's needs and interests, or more likely to effectuate Flower's program proposals, or, in short, more likely to operate the station in the public interest to a greater extent than any other applicant. In addition, the Commission gave no satisfactory explanation for its disregard or de-emphasis of other factors as to which Flower was out-ranked by other applicants, such as programming proposals, local residence of owners, the percentage of ownership participating in station operation, past broadcast records, etc. While Congress gave the Commission a great deal of discretion, it did not, as noted by this Court in *Nat. Broadcasting Co.* v. *United States, supra,* 319 U.S. at 226, "authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."

---

[13] The very broad experience of Citizens' and Community's owner-managers is summarized by the dissent below (App. 40-41). The experience of the above-mentioned persons is set forth in more detail in 9 F.C.C. 2d at 285-286, 295-301, and 322-325.

When the Commission fails to delineate the basis for its choice, it is impossible for a reviewing court to determine whether some such capricious basis is being used or not, or whether the public interest is being served. Sound administration of the Communications Act of 1934, as well as the specific requirements of the Administrative Procedure Act,[14] dictate that the courts require the FCC to give reasons or explanations for its conclusions.[15]

3. The FCC's failure to develop a consistently applied policy for comparative cases, as well as it failure to give reasons for its action, have been recurring problems. For example, Judge Friendly, after reviewing several FCC decisions in comparative cases, observed: "Such inconsistency is intolerable." Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1067 (1962). Professor Schwartz has pointed out that the Commission's inconsistency in comparative cases has "been so striking as to lead some to wonder whether Commission decisions have really been governed by any defined standards." Schwartz, *Comparative Television and the Chancellor's Foot,* 47 Geo. L. J. 655, 679 (1959). Similar criticisms of the Commission's inconsistency have been legion. Likewise, the absence of reasons or findings in Commission opinions have led to reversals by the courts. See, *e.g., Plains Radio Broadcasting Co.* v. *Federal Communications Com'n,* 175 F. 2d 359 (C.A.D.C.); *Radio Station KFH* v. *Federal Communications Com'n,* 247 F. 2d 570 (C.A.D.C.).

---

[14] 5 U.S.C. 557(c).

[15] Absent rigid judicial insistence upon the Commission's articulation of clear reasons and explanations for its conclusions in adjudicatory cases, there is danger of recurrence of the "influence" scandals of the 1950's.

While this Court has previously commented upon the comparative process in broadcast cases, it has not specifically dealt with the matters directly presented by this case, namely the Commission's failure to consistently apply some rational standards and its failure to articulate reasons for its decisions. Furthermore, the criticisms by commentators and the reversals by the Court of Appeals for the District of Columbia Circuit have not corrected the FCC's failure to carry out properly its statutory mandate in these respects. The time is now ripe for the exercise of the Court's supervisory power, and this case is a particularly appropriate vehicle.[16]

---

[16] In addition to presenting both important issues, the instant case is appropriate for review by this Court in another respect. The long delays accompanying the FCC's comparative decisional process have been called "intolerable" (App. 21, dissenting opinion of Commissioner Johnson below), and where there is a need for a broadcast facility, the public obviously suffers from such delay. However, in the present case, further delay will not affect the public interest because an interim corporation is broadcasting on channel 13 in Rochester, made up of competing applicants who are jointly managing the station (App. 49, footnote 24). As Judge Leventhal below observed, this particular interim arrangement is working well and "the effort is flourishing" (App. 49, footnote 4). Pursuant to orders of the court below, this interim operation will continue until the disposition of this case. Consequently, the public in this instance is being served despite the delay in selecting a licensee.

CONCLUSION

Because this case involves recurring questions of exceptional importance in relation to the criteria employed and the procedures utilized by the FCC in comparative hearings, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BENEDICT P. COTTONE,
JOHN C. ELDRIDGE,

Attorneys for Petitioners

Of Counsel:

FLY, SHUEBRUK, BLUME & GAUGINE

WELCH & MORGAN

WILNER, SCHEINER & GREELEY

MULLIN & CONNOR

August 1969

APPENDIX A

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14394 File No. BPCT-2929
GENESEE VALLEY TELEVISION CO., INC., ROCHESTER, N.Y.	Docket No. 14395 File No. BPCT-2944
STAR TELEVISION, INC., ROCHESTER, N.Y.	Docket No. 14460 File No. BPCT-2948
COMMUNITY BROADCASTING, INC., ROCHESTER, N.Y.	Docket No. 14461 File No. BPCT-2953
HERITAGE RADIO & TELEVISION BROADCASTING CO., INC., ROCHESTER, N.Y.	Docket No. 14462 File No. BPCT-2961
MAIN/BROADCAST CO., INC., ROCHESTER, N.Y.	Docket No. 14464 File No. BPCT-2964
THE FEDERAL BROADCASTING SYSTEM, INC., ROCHESTER, N.Y.	Docket No. 14465 File No. BPCT-2966
CITIZENS TELEVISION CORP., ROCHESTER, N.Y.	Docket No. 14466 File No. BPCT-2967
ROCHESTER BROADCASTING CORP., ROCHESTER, N.Y.	Docket No. 14467 File No. BPCT-2972
ROCHESTER TELECASTERS, INC., ROCHESTER, N.Y.	Docket No. 14468 File No. BPCT-2974
For Construction Permits for New Television Broadcast Stations (Channel 13)	

Decision

(Adopted August 3, 1967)

BY COMMISSIONER LEE FOR THE COMMISSION: COMMISSIONERS BARTLEY AND JOHNSON DISSENTING AND ISSUING STATEMENTS; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER WADSWORTH ABSENT.

I. INTRODUCTION

1. The initial decision of Hearing Examiner Annie Neal Huntting (FCC 64D-5, released Jan. 28, 1964) recommended grant of the applications of Rochester Area Educational Television Association, Inc. (RAETA), and Rochester Telecasters, Inc. (RTI). These applications, which proposed a share-time operation on channel 13 in Rochester, N.Y., were complementary and comprised a single proposal; as such they were mutually exclusive with

each of eight other applications.[1] The application of Rochester Broadcasting Corp. (RBC) was denied by the examiner as in default for failure to prosecute its application. RBC has taken no exception to the examiner's recommended disposition of its application.

2. After exceptions, briefs, and replies had been filed to the initial decision, an oral argument was held before the Commission, en banc, on November 2, 1964.[2] During that oral argument each party was afforded an opportunity to address itself to a petition to reopen the record and to remand, which had been filed on October 15, 1964, by all of the applicants except RAETA, RTI, and RBC. After hearing oral argument, we concluded that the existing record did not contain sufficient evidence to resolve the questions of: (*a*) Whether alternative means were available for broadcast of the type of educational programing proposed by RAETA, and (*b*) whether a part-time applicant such as RTI would provide an effective competitive outlet for a third network service. Therefore, we reopened the record and remanded this proceeding for a further hearing so that such evidence could be adduced, FCC 65-403, released May 13, 1965. At the same time, we indicated that each applicant would be permitted to modify its programing proposal to reflect the evolving needs of Rochester. Before any hearing sessions were held, however, the applicants entered

---

[1] Throughout this decision those eight applicants will be referred to as follows: Flower City Television Corp. (Flower); Genesee Valley Television Co., Inc. (Genesee); Star Television, Inc. (Star); Community Broadcasting, Inc. (Community); Heritage Radio & Television Broadcasting Co., Inc. (Heritage); Main Broadcast Co., Inc. (Main); the Federal Broadcasting System, Inc. (Federal); and Citizens Television Corp. (Citizens).

[2] The following parties filed motions to correct the transcript of the Nov. 2, 1964, oral argument: Flower, on Nov. 19, 1964; Community, on Nov. 25, 1964; Star, on Nov. 19, 1964; Main, on Nov. 13, 1964; and RTI, on Nov. 24, 1964. No objections to the motions have been filed and they will be granted.

into a series of negotiations. As a result of those negotiations, RAETA requested the dismissal of its application so that it could use the funds it obtained as reimbursement for its expenses in connection with its application to establish a full-time educational television station on another available channel. Thereafter, RAETA's application in this proceeding was dismissed with prejudice, 2 FCC 2d 448 and 1029 (1966), and it commenced operation of station WXXI in Rochester.

3. In addition to the dismissal of RAETA's application, the impact of our *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965), which was adopted after the release of the remand order, must be considered in this proceeding, since we clearly indicated that the *Policy Statement* would apply to all cases to be decided in the future. In the *Policy Statement* we noted that program plans often have to be changed to take account of new conditions when the successful applicant begins operation and that our experience indicates that the program plans of competing applicants are so similar that minor differences among them generally prove to be of no significance. For these reasons, we stated that no issue would ordinarily be designated for program plans and policies, or for staffing plans or other program planning elements, and that evidence on these matters would not be considered under the standard comparative issue. As pointed out in the *Policy Statement,* each applicant has the responsibility for being familiar with the community and area to be served and for proposing an adequate programing service to meet the ascertained needs and interests. From our consideration of the record in this proceeding, we are persuaded that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs. As we stated in the *Policy Statement,* such ordinary differences in judgment will not be compared in the hearing process when each of

the applicants, as here, has demonstrated that it is able to carry out its proposal.[3]

4. In view of these events which occurred after the release of our remand order in this proceeding, we concluded that no further evidentiary submissions would be required and that no useful purpose would be served by permitting the applicants to modify their programing proposals. Accordingly, the remand order was set aside so that this proceeding could be decided on the basis of the existing record (FCC 66-347, released Apr. 21, 1966). Subsequently, because of the circumstances which arose after the November 2, 1964, oral argument, we concluded that a further oral argument would be of assistance in resolving the remaining issues in this proceeding. That further argument, in which each of the nine remaining applicants participated, was held before the Commission, en banc, on May 22, 1967.[4]

5. Due to the dismissal of RAETA's application, the only issues remaining in dispute in this proceeding are those concerning Star's financial qualifications, Federal's technical qualifications with respect to its antenna site, and the standard comparison of the applicants. The examiner resolved the issues concerning Star and Federal in favor of those applicants. No exceptions have been filed to these findings and conclusions, and we adopt them as our own. We have reviewed the examiner's remaining findings of

---

[3] Because of RAETA's specialized programing proposal, the standard comparative issue in this proceeding was enlarged to determine whether there were particular types or classes of programs for which there was an unfulfilled need in the Rochester area and the extent to which that need would be met by each applicant (FCC 62-385, released Apr. 13, 1962). Since, as noted above, RAETA's application has been dismissed and station WXXI has commenced operation, the evidentiary showings submitted with respect to RAETA's specialized proposal are now moot.

[4] Citizens filed a motion to correct the transcript of the May 22, 1967, oral argument on June 20, 1967. No objection to the motion has been filed, and it will be granted.

fact in the light of the applicants' exceptions, and it is our view that they are substantially accurate and complete. Accordingly, they are adopted with the modifications noted herein and in the appendix to this decision, where our rulings on the applicants' exceptions to the initial decision are set forth. Although the examiner proposed to grant the share-time proposal of RAETA and RTI, RAETA has withdrawn its application, and it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result.

II. PETITIONS FOR LEAVE TO AMEND

6. Before we consider the comparative qualifications of the remaining applicants, it will be of assistance to dispose of certain petitions for leave to amend applications which have been filed by several of the applicants. The substance and disposition of each pending petition is as follows:

(*a*) On June 2, 1967, Flower requested leave to amend its application to reflect that one of its stockholders, Harper Sibley, Jr., has acquired an interest in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044). No opposition to this petition has been filed, and it will be granted.[5]

(*b*) On May 18, 1967, Star requested leave to amend its application to reflect that: (1) None of its principals has any ownership interest in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.; (2) five of its stockholders, Maurice R. Forman, Robert S. Kieve, James M. Tray-

[5] On Nov. 30, 1965, Flower notified us of the death of Louis A. Wehle, an 8.33-percent stockholder, and of the voluntary petition for bankruptcy filed by Paul E. McNamara, a 0.34-percent stockholder.

hern, Jr., Vincent A. Lopopolo, and Roy Wetzel, have acquired interests in Empire Broadcasting Corp., which is the assignee in an application for assignment of license of station KLIV, San Jose, Calif. (files Nos. BTC-5315 and BAL-6044); (3) three of its stockholders are connected with the University of Rochester, which owns stock in Harcourt, Brace & World, Inc., which, in turn, has filed an application for a new UHF television station in Rochester, N.Y. (file No. BPCT-3922);[6] (4) Robert S. Kieve and James M. Trayhern, Jr., have agreed, prior to moving to San Jose, to transfer portions of their interests in the applicant to Maurice R. Forman, thus reducing their stockholdings in the applicant to 5 and 2 percent, respectively; and (5) Maurice R. Forman has been elected a director of the Federal Reserve Bank of New York. No opposition to this petition has been filed, and it will be granted.

(*c*) On May 16, 1967, Community notified us that: (1) One of its stockholders, F. Robert Greene, is no longer connected with the application of WEXC, Inc., for a new standard broadcast station in Depew, N.Y. (docket No. 14031), which application has been dismissed by the Review Board (FCC 64R-314, released June 8, 1964); (2) the nonbroadcast business activities of F. Robert Greene have changed in certain respects; and (3) another of its stockholders, Michael R. Hanna, would completely sever his connection with Cornell University station WHCU, rather than merely taking a leave of absence from that position, in order to become Community's director of education and public affairs in the event of a grant of Community's application.

---

[6] By a public notice, dated June 27, 1967, we announced that the Harcourt, Brace & World, Inc., application for Rochester had been dismissed pursuant to sec. 1.568(a) of our rules. In addition, Harcourt, Brace & World, Inc., has returned the construction permits for new television stations in other communities, which it had previously obtained.

(*d*) On January 28, 1964, Heritage requested leave to amend its application to reflect the death of Roland G. McDonald, a 4-percent stockholder.[7] No opposition to this petition has been filed, and it will be granted. On October 22, 1964, Heritage requested leave to amend its application to reflect the death of James M. Landis, who was a joint tenant of a one-fourth undivided 2-percent interest in the applicant and to reflect the vesting of his interest in the surviving joint tenants, Justin N. Feldman, Lawrence H. Reilly, Jr., and George J. Solomon. No opposition to this petition has been filed, and it will also be granted.

(*e*) On November 29, 1965, RTI filed a petition requesting leave to amend its application to specify full-time instead of part-time, hours of operation and to alter its financing proposal. Oppositions were filed by Flower, Star, Federal, Citizens, and the Broadcast Bureau, and RTI filed a reply in response to those oppositions. Because it appeared that grant of RTI's petition would require an additional hearing and would further delay the resolution of this proceeding, we concluded that RTI's petition for leave to amend its application should be denied, FCC 66-593, released July 8, 1966. During the May 22, 1967, oral argument, RTI again requested leave to amend its application to specify full-time operation and argued that a further hear-

[7] This petition was dismissed in our order remanding this proceeding for a further hearing, FCC 65-403, released May 13, 1965, when the applicants were directed to submit such information as part of the overall up-dating of their proposals. However, Heritage failed to resubmit this request, and the remand order was subsequently set aside, FCC 66-347, released Apr. 21, 1966. Under these circumstances, it is appropriate to consider the merits of Heritage's Jan. 28, 1964, petition at this time. Similarly, a petition for leave to amend its application, filed by RAETA on June 24, 1964, was dismissed by the remand order, and the request was never resubmitted. In view of the dismissal of RAETA's application, this petition will be dismissed as moot.

ing would not be required since the initial decision contains complete findings of fact with respect to all of the applicant's principals. After further consideration, we are persuaded that the public interest would be better served by permitting RTI, without altering its comparative qualifications, to bring its proposal up to date so that this proceeding can be decided on the basis of the facts as they now exist. For this reason, we shall grant RTI's request for leave to amend its application to the extent of permitting it to specify full-time operation.

III. EVALUATION OF COMPARATIVE CRITERIA

A. Diversification of Control of the Media of Mass Communications

7. When the record was closed in this proceeding, Star, Community, and Federal each had substantial connections with other broadcast interests. As noted in paragraph 6, however, Star's principals have disposed of their interests in stations WBBF and WBBF-FM, Rochester, N.Y.; WGVA, Geneva, N.Y.; and WTLB, Utica, N.Y.;[8] and Community's stockholder, F. Robert Greene, is no longer connected with an application for a new standard broadcast station in Depew, N.Y. On the other hand, Federal continues to be connected with both station WSAY, Rochester, and station WNIA, Cheektowaga, N.Y. Federal is itself the licensee of WSAY and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, thus providing complete common control between the proposed television station and the two standard broadcast stations. Although

[8] Although both Star and Flower have amended their applications to reflect an ownership interest in the assignee of standard broadcast station KLIV in San Jose, Calif., by certain of their stockholders, we are not persuaded that such ownership interests should be given any significant weight in this proceeding, in view of KLIV's distance from Rochester and the less than controlling interests held.

WNIA, is located about 70 miles west of Rochester, WSAY is located in Rochester, where Federal's proposed television station would be located. Since none of the other applicants is otherwise associated with the media of mass communications to any significant extent,[9] we conclude that an equal preference must be given to each of those applicants over Federal on this very important criterion. While the weight of those preferences is diminished somewhat by the existence of other media of mass communications in the Rochester area, the preferences still must be considered substantial in this proceeding because each of those applicants would provide a new voice in the Rochester area. For these reasons, we conclude that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications.

B. Participation in Station Operation by Owners

8. On this important factor all of the applicants, with the exception of Genesee and Heritage, propose full-time participation by a substantial percentage of the stock ownership, but none, with the exception of Federal, proposes to have more than one-half of the ownership interest represented in full-time station operation. Genesee has no full-time participation by any person with an ownership interest and Heritage has almost none. Federal has 100 percent integration of ownership with management. In addition, Federal's participation is by a long-term local resident with many years of radio experience. Federal, therefore, is to be substantially preferred over the other applicants on this factor. Among the other parties with substantial integration, Flower ranks the highest, in view of the

[9] Under the circumstances of this proceeding, we are convinced that the facts with respect to Genesee's alleged connection with the Gannett Co., Main's connection with a common carrier service, and Citizen's connection with a local FM station are not sufficient to warrant an adverse conclusion as to any of these applicants.

broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II. We recognize that the integration of Flower is not accompanied by past local residence, and that in this respect it is not the equal of RTI, Star, Main, and Federal. However, in view of the fact that the great majority of Flower's stock is held by persons with area familiarity and the further fact that the great majority of its stock is also held by persons who will devote some time to the operation of the station, as is also true of most of the other applicants, we do not believe that in this particular case the absence of past local residence by the two stockholders participating full time in the operation of the station is so significant. In addition, as we noted in the *Policy Statement*, persons participating full time in station operation by definition will become local residents. In view of our conclusions, we do not believe further ranking of the other parties, some of whom are very close, is necessary on this issue.

C. Proposed Program Service

9. In view of our discussion with respect to this criterion in paragraph 3, supra, we are convinced that none of the applicants is entitled to a preference over any of the other applicants on the basis of its preparation and planning, its staffing, or its program policies and proposal.

D. Past Broadcast Record

10. Among the applicants, Star, Community, and Federal presented evidence with respect to the operation of broadcast stations in which their principals held an ownership interest.[10] In the *Policy Statement*, supra, we stated that a

[10] Although Larson, who is a 10-percent stockholder in Flower, had an ownership interest in station KDYL-AM and KDYL-TV in Salt Lake City, Utah, during the period 1953-59, no exception was taken to the examiner's finding that the information in the record was not sufficiently comprehensive to form the basis for a judgment with respect to the operation of those stations.

past broadcast record within the bounds of average performance will be disregarded, since at least average future performance is expected. Thus, unless such a record is unusually good or unusually bad, it will not be given weight in the comparative analysis. The examiner's findings establish that both Star's and Federal's broadcast stations have adopted a music and news programing format. Although each has provided some local live programing and some non-entertainment programs, we are not persuaded that any of the stations has shown such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record. In view of the average performance by each of these stations, we conclude that neither Star nor Federal is entitled to a preference over any of the other applicants with respect to this criterion.

11. On the other hand, Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station. At the time of WHAM's acquisition by Greene in 1956, the assignee proposed to limit entertainment programing to approximately 70 percent of the broadcast schedule. During the 1958 composite week, entertainment programing comprised only 62.4 percent of the broadcast schedule, live programing was broadcast 24.48 percent of the time and, except for discussion programs, the promised percentages in the nonentertainment categories were exceeded in every instance. Community's showing demonstrated that talks, interviews, and discussions on community issues and problems were carried on WHAM in several regularly scheduled entertainment and talk programs. In addition, WHAM carried regularly a weekday 5-minute commentary on local events and a 30-minute Sunday afternoon roundtable discussion of local projects and problems. In view of the facts that Greene was general manager and an owner of WHAM

during this period [11] and that Greene proposes to be active in a full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it. For these reasons, we conclude that Community is entitled to a preference over all of the other applicants on the basis of its 15 percent stockholder's relationship to WHAM's past broadcast record.

E. Other Criteria

12. None of the applicants claims a preference with respect to the efficient use of this television channel, and, accordingly, we do not find any difference among the applicants with respect to this criterion. Although we have indicated that a comparative hearing should not be converted into a search for remote and insignificant blemishes on the applicants' reputation, the *Policy Statement* notes that substantial character deficiencies may warrant disqualification or a demerit in the comparative analysis. In this proceeding, the examiner made findings concerning the qualifications of Heritage's president, director, and 2 percent stockholder, Bernard P. Birnbaum. The record establishes that Birnbaum was chairman of the board of directors and one of four promoters of the Faradyne Electronics Corp. when the Securities & Exchange Commission suspended the effectiveness of two registration statements filed by the corporation. In support of its action, the Securities & Exchange Commission stated that the corporation had filed unreliable and materially false and misleading registration statements in an effort to raise public funds, most of which were to be used to make payments to the corpora-

[11] Although Greene retained his interest in WHAM and in two other stations for less than 3 years, we are not persuaded that such a fact should preclude consideration of the merits of WHAM's past broadcast record in our comparison of all the applicants.

tion's promoters pursuant to transactions either not revealed or described in deceptive terms. Although given an opportunity to show that he had no knowledge, responsibility, or involvement in these matters, Birnbaum merely stated that he never did any active work for the corporation. Under these circumstances, we are convinced that this must be considered to be a substantial reflection on Birnbaum's and Heritage's character qualifications, and that a comparative demerit must be assessed against Heritage because of Birnbaum's connection with the corporation's misconduct.

IV. CONCLUSION

13. We believe that the public interest would best be served by a grant to Flower. We conclude that no perferences are warranted with respect to the proposed program services and the efficient use of this television channel. In view of Birnbaum's connection with the Faradyne matter, we hold that a comparative demerit must be assessed against Heritage. We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises

from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50 percent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower.

14. *Accordingly, it is ordered:*

(*a*) That the motions to correct the transcript of the November 2, 1964, oral argument, filed November 13, 1964, by Main; November 19, 1964, by both Flower and Star; November 24, 1964, by RTI; and November 25, 1964, by Community, *Are granted.*

(*b*) That the motion to correct the transcript of the May 22, 1967, oral argument, filed June 20, 1967, by Citizens, *Is granted.*

(*c*) That the petition for leave to amend its application, filed June 2, 1967, by Flower, *Is granted.*

(*d*) That the petition for leave to amend its application, filed May 18, 1967, by Star, *Is granted.*

(*e*) That the petitions for leave to amend its application, filed January 28 and October 22, 1964, by Heritage, *Are granted.*

(*f*) That the petition for leave to amend its application, filed on June 24, 1964, by RAETA, *Is dismissed* as moot.

(*g*) That the memorandum opinion and order (FCC 66-593, released July 8, 1966) *Is set aside* and that the petition for leave to amend its application, filed on November 29, 1965, by RTI, *Is granted* to the extent reflected in paragraph 6(e) of this decision.

(*h*) That the application of Flower City Television Corp., file No. BPCT-2929, for a construction permit for a new television broadcast station to operate on channel 13 in Rochester, N.Y., *Is granted;* and that each of the other applications designated in the caption of this decision *Is denied;* and

(*i*) That the construction authorized herein is subject to the condition that the ability of standard broadcast stations WBBF, WROC, WHEC, and WSAY to operate in accordance with the terms of their licenses shall not be adversely affected thereby, particularly with respect to their radiation patterns, and that at least five field intensity measurements on each radial established during the last proof of performance for each of these standard broadcast stations shall be submitted with the television application for license to prove that such patterns have not been materially affected.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

9 F.C.C. 2d

APPENDIX

RULINGS ON EXCEPTIONS TO THE INITIAL DECISION

EXCEPTIONS OF FLOWER CITY TELEVISION CORP.

Exception No.	*Ruling*
1-5, 7, 13-16, 28-46, 48-54, 56	Denied. The examiner's findings adequately and correctly reflect the record.
6	Granted. "Sixteen" is substituted for "six" in the first sentence of finding 22.
8-12, 92-95, 111-112, 122-123, 131-132, 135-136, 143, 145, 150-151, 166-170	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
17-27, 47, 55, 59-91, 96-110, 118-119, 129-130, 139-141, 147, 152, 154, 159, 162-165	Denied. These matters are moot in view of the dismissal of RAETA's application.
57-58, 114, 117, 157	Denied. See pars. 3 and 9 of our decision herein.
113, 115-116, 120-121, 124-128, 133, 142, 148, 158	Granted. See par. 5 of our decision herein.
134, 137-138, 144, 146, 149, 160-161	Granted to the extent reflected in our decision herein.
153	Denied. See footnote 9 to par. 7 of our decision herein.
155-156	Denied. See pars. 10 and 11 of our decision herein.

EXCEPTIONS OF GENESEE VALLEY TELEVISION CO., INC.

1-12, 36-42	Denied. The examiner's findings adequately and correctly reflect the record.
13, 63, 67	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
14-35, 43-47, 51-53, 71-73	Denied. See pars. 3 and 9 of our decision herein.
48-50, 56	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-55, 57-62, 68	Granted. See par. 5 of our decision herein.
64-66, 69-70	Denied. See par. 8 of our decision herein.
74-75	Denied for the reasons set forth in our decision herein.

EXCEPTIONS OF ROCHESTER AREA EDUCATIONAL TELEVISION ASSOCIATION, INC.

1-54	Denied. These matters are moot in view of the dismissal of RAETA's application.

EXCEPTIONS OF STAR TELEVISION, INC.

1, 3-19, 21-39, 41-54, 57-58, 60-69, 71-82, 84-89	Denied. The examiner's findings adequately and correctly reflect the record.
2	Denied. This matter is moot. See pars. 6 and 7 of our decision.
20, 40	Denied. The challenged actions were correct.
55-56, 59, 70, 90	Denied as not of decisional significance.
83, 91-130	Denied. These matters are moot in light of the dismissal of RAETA's application.

Exception No.	*Ruling*
Exceptions to Conclusions	
1	Granted. See par. 5 of our decision herein.
2-5, 12	Denied. These matters are moot in view of the dismissal of RAETA's application.
6-7	Denied. See par. 8 of our decision herein.
8-11	Denied. See pars. 3 and 9 of our decision herein.
13	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF COMMUNITY BROADCASTING, INC.	
A-1 to A-2, B-1 to B-23, C-1, C-4 to C-8, C-10 to C-15, D-1, D-7 to D-8	Denied. The examiner's findings adequately and correctly reflect the record.
B-24	Denied. The examiner was correct in holding that the past broadcast record of stations WHCU and WHCU-FM is immaterial since Hanna had no ownership interest in those stations.
C-2, D-5 to D-6	Granted. The clauses are deleted.
C-3, D-3 to D-4	Denied. The examiner's reasoning is correct.
C-9, D-2, D-9 to D-12	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
E-1 to E-23, F-1(f), F-1(l)	Denied. These matters are moot in view of the dismissal of RAETA's application.
F-1(a) to (d), F-1(g), F-1(j) to (k), F-1(m) to (n)	Granted. See par. 5 of our decision herein.
F-1(e)	Denied. See footnote 9 to par. 7 of our decision herein.
F-1(h) to (i)	Denied. See pars. 3 and 9 of our decision herein.
F-2	Granted to the extent reflected in our decision herein and denied in all other respects for the reasons stated in our decision herein.
EXCEPTIONS OF HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.	
1-4, 14, 16-19, 23, 26	Denied. The examiner's findings are correct and are supported by the record.
5, 11-13, 15, 24-25	Denied. The examiner's findings adequately and correctly reflect the record.
6-10, 27-49, 60	Denied. These matters are moot in view of the dismissal of RAETA's application.
20-22	Denied. The requested adverse findings are immaterial in light of our decision herein.
50-54(3), 57	Granted. See par. 5 of our decision herein.
54(4)-55	Denied. See par. 8 of our decision herein.
56	Denied. See pars. 3 and 9 of our decision herein.
58-59, 61	Denied for the reasons set forth in our decision herein.
EXCEPTIONS OF MAIN BROADCAST CO., INC.	
1-32	Denied. The examiner's findings adequately and correctly reflect the record.
33-39, 51-53, 70	Denied. The requested adverse findings and conclusions are immaterial in light of our decision herein.
40-50, 75	Denied. These matters are moot in view of the dismissal of RAETA's application.
54-58	Granted. See par. 5 of our decision herein.
59-66	Denied. See par. 8 of our decision herein.
67-69, 71-73	Denied. See pars. 3 and 9 of our decision herein.
74, 76	Denied for the reasons set forth in our decision herein.

Exception No.	*Ruling*
	EXCEPTIONS OF FEDERAL BROADCASTING SYSTEM, INC.
1	Denied. The examiner's ruling is correct.
2-9	Denied. The examiner's findings adequately and correctly reflect the record.
10, 12-14	Granted. See par. 5 of our decision herein.
11	Denied. These matters are moot in view of the dismissal of RAETA's application.
15-18	Granted to the extent reflected in par. 8 of our decision herein.
19-22, 24	Denied. The requested adverse conclusions are immaterial in light of our decision herein.
23	Granted to the extent reflected in par. 10 of our decision herein.
25	Denied for the reasons set forth in our decision herein.
	EXCEPTIONS OF CITIZENS TELEVISION CORP.
1, 3, 7-14, 21, 22, 26, 28-30, 32-36, 56	Denied. The examiner's findings adequately and correctly reflect the record.
2, 4, 5, 15, 23-25, 27, 31	Denied for failure to comply with sec. 1.277(a) of the Commission's rules.
6	Denied as not of decisional significance.
16-20, 37-54, 65-66, 71	Denied as moot in view of the dismissal of RAETA's application.
55, 72	Denied. See our entire decision herein.
57-61, 63-64	Denied in substance. See pars. 3, 8, and 9 of our decision.
62, 68, 69	Denied in substance. See pars. 10 and 11 of our decision.
67	Denied in part and granted in part. See par. 7 of our decision.
70	Granted in substance as to 70(c) and otherwise denied. See par. 12, also 10 and 11 of our decision and the ruling, supra, on exception 16 of Citizens Television Corp.
	EXCEPTIONS OF ROCHESTER TELECASTERS, INC.
1	Granted in substance. See par. 8 of our decision herein.
2	Denied. See footnote 9 to par. 7 of our decision herein.

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

In this decision, the Flower application is not preferred in any of the six comparative criteria, yet it is granted and the other nine applications are denied.

I dissent and vote to grant the application of the Federal Broadcasting System, Inc.

The majority decision awarded a substantial preference to Federal in the comparative criterion of "participation in station operation by owners." There can be no argument with that finding. Federal is the only applicant herein having 100 percent integration of ownership with management, and that is by a long-term local resident with many years of radio experience. In terms of the likelihood of effectuation of proposals, greater certainty lies, I believe, with an applicant whose knowledge of local needs is brought to the day-to-day management and operation of the station. Gordon Brown, Federal's sole stockholder, would devote 40 hours per week as general manager. With his lifetime residence in Rochester, his long association in the broadcasting industry, and his operation of a radio station (WSAY) in Rochester for many years, Gordon Brown (Federal), of all of the applicants herein, makes the most convincing showing that the views of the locally oriented ownership would be directly translated into the daily operation of the station and that the licensee would remain aware of and responsive to community needs on a continuing basis. None of the other applicants herein proposes to have more than one-half of the ownership interest represented in full-time station operation.

I disagree further with the finding in the majority's decision that Flower ranks second to Federal in the criterion of "participation in station operation by owners." As the decision seems to admit, the fact that most of the Flower stock is held by persons with area familiarity and by per-

sons who will devote some time to the operation of the station is also true of most of the other applicants. Thus, Flower should be rated equal to, and not superior to, applicants other than Federal.

The majority decision awards each of the other applicants a substantial preference over Federal on the comparative criterion of "diversification of control of the media of mass communications" because Federal is the licensee of WSAY, Rochester, and its 100 percent stockholder, Gordon P. Brown, is the licensee of WNIA, Cheektowaga, N.Y. The weight of those preferences is diminished substantially, in my opinion, by the existence of 16 broadcast stations licensed in Rochester (six AM, seven FM, three TV, including channel 13). I agree that, as set forth in our *Policy Statement on Comparative Broadcast Hearing,* diversification of control of media of mass communications is a primary factor in comparative considerations. However, it is my position that, in diversification of control of media, a licensee's facilities, i.e., AM, FM, TV, make up a broadcast unit. As technical advancements were made, and an AM licensee added FM and TV to enhance its broadcast service in the community, I believe the public interest was benefited. Thus, I find generally that a proposal to add a facility to such a locally oriented unit is in the public interest and not subject to demerit per se. See my concurring statement in *Peoples Broadcasting Corp.,* docket No. 15619 (May 19, 1967). The majority here states that the preferences to the other applicants "must be considered substantial in this proceeding because each of those applicants would provide a 'new voice' in the Rochester area." I disagree. I believe that more basic than the matter of a "new voice" is the quality of the "voice" that is added to the area.

In my evaluation, the preference of each applicant over Federal on diversification of control of mass media is reduced from substantial to slight, and Flower's second place

to Federal is reduced to equal status with the applicants other than Federal.

With Flower receiving no preference in any of the comparative criteria, even pursuant to the majority decision, I believe that a grant is not supported. As indicated above, I believe that the preference for Federal is decisive and that its application should be granted in the public interest.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

I have indicated before my concern that the comparative hearing process is a thoroughly unsatisfactory way to award valuable broadcast properties. *Farragut Television Corp.*, 8 F.C.C. 2d 279, 285 (1967) (dissenting statement). No better example could be chosen to demonstrate this than the case which the Commission decides today.

At stake is a Rochester, N.Y., VHF station which will likely be worth about $4 million as soon as it is operating with a 3-year license and a network affiliation. Thus, understandably, there are nine contenders in the ring battling for the construction permit after which the award of a regular license is a formality.

First, the case is an example of the intolerable delay which can accompany the comparative process. Designation for hearing was on November 15, 1961. Further appeals seem likely, and remand and further hearings are, at least, possible. But, even if the present decision survives appeal, the case will have taken 6 years for resolution.

But more fundamentally disturbing than the delay is the unsatisfactory result which the Commission eventually reaches. The point is not that I would award the construction permit to a different applicant than has the Commission. I would, but my preference is not a strong one, and the Commission's choice is quite satisfactory. The point is that there is so little in the way of significant

differences among most of the nine applicants that the extraordinary marathon conducted by the Commission and the applicants has produced no more satisfactory result than would a drawing from a hat.

The Commission's choice to run this Rochester station is Flower City Television Corp. Flower is chosen over the eight other applicants because it ranks second in what we call the "integration of ownership and management" (and the majority here calls "participation in station operation by owners"). The first in this regard, Federal Broadcasting System, Inc., unlike Flower, has a substantial detriment on other grounds. But it is clear that the preference for Flower over the other applicants on "integration" cannot be very great. Less than 20 percent of Flower's stock is held by persons intending to participate in station affairs on a full-time basis. Federal's one stockholder will be active in station affairs on a full-time basis, and four other applicants have more full-time integration than Flower. The majority is able to point to other related facts to bolster Flower's position on integration. Almost 80 percent of its shareholders will devote some time to the station, but four of the other candidates exceed Flower in this showing. The majority also points to Flower's stockholders who are familiar with the Rochester area, but none of these plan full-time devotion to station affairs, and as much area familiarity is also found in several of the other applicants. Likewise, Flower's percentage of fully "integrated" shareholders with broadcast experience, also alluded to by the majority, is exceeded by several of the other applicants.

It may well be that, by combining all these factors and calling them by the undescriptive title "integration of ownership and management" or "participation in station operation by owners," it is possible to conclude that Flower ranks second to Federal on this criterion for selection. But it is quite clear that the choice is not a certain one,

and that the Commission might, with a colorable justification, have chosen a number of the other applicants over Flower.

Although Federal clearly excels in the "integration" showing, I would have to agree with the Commission that it should not be awarded this station. Federal is the only applicant which already controls a Rochester broadcasting station. I attach great importance to diversifying control of broadcast media both in the country and in individual communities. Thus, I cannot agree with Commissioner Bartley that a licensee should be allowed an AM, an FM, and a TV station in any community before he receives a diversification demerit. On the contrary, local diversification seems even more important to me than national diversification.

Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record, because its proposed general manager and significant stockholder has a commendable record.

I do not make this judgment confidently, for it appears to me impossible to make meaningful distinctions between applicants with such insignificant and noncomparable differences. The comparative process for selection of broadcasting licensees is a sad commentary on the American administrative process. The basic bankruptcy of the approach and the absence of any correlation between the results reached and any discernible policy has been demonstrated long ago. I am neither the first to feel or to say this, yet neither Congress nor this Commission has made necessary moves to change the process—a change which is long overdue.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Applications of FLOWER CITY TELEVISION CORP., ROCHESTER, N.Y., ET AL. For Construction Permits for New Television Broadcast Stations (Channel 13)	Dockets Nos. 14394, 14395, 14460, 14461, 14462, 14464, 14465, 14466, 14467, 14468 File No. BPCT-2929

Memorandum Opinion and Order

(Adopted November 22, 1967)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING A STATEMENT; COMMISSIONER COX NOT PARTICIPATING; COMMISSIONER JOHNSON DISSENTING.

1. This proceeding involves 10 mutually exclusive applications for construction permits for a new television station to operate on channel 13 in Rochester, N.Y. By our decision (FCC 67-924, 9 FCC 2d 249), released August 3, 1967, we granted the application of Flower City Television Corp. Seven of the nine remaining applicants, Genesee Valley Television Co., Inc., Community Broadcasting, Inc.,[1] Heritage Radio & Television Broadcasting Co., Inc., Main Broadcast Co., Inc., the Federal Broadcasting System, Inc., Citizens Television Corp., and Rochester Telecasters, Inc., have now filed petitions for reconsideration of that decision. Oppositions to those petitions were filed by Flower and the Broadcast Bureau, and replies to the oppositions were filed by Community, Main, and Citizens.

---

[1] Because its petition for reconsideration exceeds our limitation on such pleadings by one-third of a page, Community filed a request for acceptance of its petition for reconsideration on Sept. 5, 1967. No opposition has been filed to Community's request. In view of the de minimis nature of Community's violation, its petition for reconsideration will be accepted.

2. In our decision, we held that each of the other applicants must be given a substantial preference over Federal with respect to the diversification of control of the media of mass communications criterion due to Federal's connection with stations WSAY, Rochester, and WNIA, Cheektowaga, N.Y. Federal was given a substantial preference over all of the other applicants for its participation in station operation by owners because of the full-time integration of its 100 percent owner, Gordon P. Brown, but Flower was preferred over all remaining applicants in view of the extensive broadcasting, and particularly television, experience of G. Bennett Larson, and the somewhat lesser broadcast experience of Gordon Auchincloss II. While some other applicants had greater degrees of integrated local residence, we noted that the significance of the absence of past local residence by Flower's two fully integrated stockholders was diminished by the facts that the great majority of Flower's stock is held by local residents and that the great majority of its stockholders will devote some time to the operation of the station. We also held that Community was entitled to a preference over all of the other applicants for the commendable past broadcast record of station WHAM, Rochester, when Community's 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station.

3. In conclusion, we stated that Flower was preferred over Federal, since the public interest in a television station in Rochester, which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We also preferred Flower over Community, whose integrated stockholders also lack area familiarity, because of the former's superiority, arising from the experience factor, in the area of participation in station operation by owners. While Community's past broadcast record was commendable, we held that it was not so outstanding as to warrant

substantial weight, since it was not the past record of Community, itself, but rather that of its 15 percent stockholder and proposed general manager. Thus, we concluded that the public interest would be best served by a grant to Flower.

4. Some of the instant petitioners have advanced the threshold contention that there has been no valid initial decision in this proceeding; that they have been deprived of their right to file exceptions to a proper initial decision; and that our decision is, therefore, procedurally defective. They urge that the failure of Presiding Examiner Annie Neal Huntting to rank each of the losing applicants under the comparative criteria and the dismissal of the application of the Rochester Area Educational Television Association, 2 FCC 2d 448 and 1029 (1966), render invalid the initial decision which was released in this proceeding. We are convinced that these contentions are entirely without merit. The initial decision prepared by Examiner Huntting made exhaustive findings of fact with respect to each applicant's showing under all of the comparative criteria, and included ample conclusions of law and a comparative analysis of each of the applicants.

5. It is clear that the initial decision complies with all of the requirements of the Administrative Procedure Act and of our regulations, since it included a statement of findings and conclusions, as well as the reasons or basis therefor, upon all issues of law and fact; since the parties were fully informed of the issues and proposed grounds of the decision; and since the initial decision was susceptible when it was released of becoming final Commission action. Under secton 1.276 of our rules, the initial decision in this proceeding was precluded from becoming a final action by the exceptions which were filed long before RAETA's application was dismissed, so that the latter action could not have deprived the initial decision of the validity which it had when it was released. It is also clear

that each of the applicants filed extensive exceptions to the initial decision, obviously demonstrating that the parties had been fully informed of the issues and the proposed grounds of the decision.

6. While the exceptions of some of the applicants objected to the examiner's failure to rank all of the losing applicants among themselves in claiming that their proposals should be granted, none of the applicants argued then or at any time prior to the oral argument of May 22, 1967, that it was necessary to remand this proceeding for the preparation of a new initial decision. Indeed, as late as March 27, 1967, the applicants, which now claim that our final decision is procedurally defective, joined in a petition urging us to resolve this proceeding by issuing such a decision. In view of all of these facts and circumstances and the further fact that each of the applicants' extensive exceptions was considered in detail, we are convinced that none of the applicants in this proceeding has been deprived of any procedural right and that these contentions must be rejected.

7. In other respects the petitions for reconsideration which have been filed in this proceeding are substantially devoted to a further analysis of the reasons why each petitioner's application should be granted.[2] Since each of the

[2] In connection with its claim that its application should be granted, Citizens, on Sept. 5, 1967, filed a petition for leave to amend, requesting us to accept its amendment in which its 10 percent stockholder, William A. Fay, would commit himself to devote his full time to Citizens' proposed station. Citizens contends that the amendment is consistent with Fay's original commitment to devote at least 15 hours weekly and full time if necessary and that due process requires acceptance of the amendment, since Community's request to improve its integration proposal was granted. Flower opposes Citizens' petition, urging that it is a blatant attempt to secure an advantage in this comparative proceeding and that it would require a further hearing to permit cross-examination of Fay if the amendment were granted. We agree

petitioners merely relies upon its own evaluation of the comparative qualifications of each of the applicants, we are not persuaded that any useful purpose would be served by a further summary of those contentions. As is apparent from our decision, there are a number of outstanding applicants in this proceeding, and it has been very difficult to select the one applicant that is superior to all of the others. However, one of those applicants must be chosen to be the licensee of this Rochester television station and, thus, the problem in this extremely close proceeding has been to determine which of the applicants is the best. In furtherance of that purpose, we have permitted the parties to present oral argument on two different occasions,[3] and we have given lengthy and detailed consideration to the applicants' views which they have presented in their arguments, in their exceptions, and in their briefs.

8. The petitioners are once again arguing that their versions of the facts require grant of their respective

---

with Flower that Citizens' petition should be denied. Citizens' request is an undisguised attempt, long after the record has been closed, and even after the final decision was issued, to improve its comparative posture to the detriment of the other applicants in this proceeding. Citizens' petition must be denied, since the other applicants would be entitled to a further hearing to test Citizens' improved proposal and since there is no justification for the gross delinquency with which this proposed modification has been filed. For these same reasons, no weight can be given to the events occurring after the close of this record, which Citizens now relies on in its petition for reconsideration. Citizens is in error when it contends that we granted Community's request to improve its integration proposal. Although par. 6(c) of our decision recites that Community had notified us of certain facts with respect to its stockholder, Michael R. Hanna, those facts could not be, and were not, given any weight in our comparative evaluation of the applicants in this proceeding.

[3] Although some of the petitioners have again requested oral argument in connection with the present pleadings, we are persuaded that each of the applicants has had ample opportunity to make an oral presentation of its views in this proceeding.

proposals for essentially the same reasons that they have been urging throughout this proceeding. It is clear that rehearing will not be granted merely for the purpose of again debating matters which we have fully considered. See *WWIZ, Inc.*, 37 FCC 685 (1964). Nonetheless, while we concluded that Flower's application should be granted only after exhaustive consideration of this record and thorough analysis of the comparative qualifications of each of the applicants, we have again reviewed our decision in light of petitioner's present contentions and we are convinced that they have presented no reason which warrants a departure from the findings [4] and conclusions contained in that decision. Under these circumstances, we remain convinced that the public interest will be best served by a grant of Flower's application and, thus, the petitions for reconsideration of that determination must be denied.

9. Accordingly, *It is ordered:* (*a*) That the request for acceptance of petition for reconsideration, filed on September 5, 1967, by Community Broadcasting, Inc., *Is granted;* (*b*) that the petition for leave to amend, filed on September 5, 1967, by Citizens Television Corp., *Is denied;* and (*c*) that the petitions for reconsideration, filed on September 5, 1967, by Genesee Valley Television Co., Inc., Community Broadcasting, Inc., Heritage Radio & Television Co., Inc., Main Broadcast Co., Inc., the Federal

---

[4] Citizens asserts that we have failed to resolve the problem raised by its exception No. 8 concerning the past broadcast records of stations WHAM, WHFM, and WHAM-TV, Rochester, while Citizens' stockholder, William A. Fay, was a 1-percent stockholder of those stations. While our ruling that the examiner's findings adequately and correctly reflect the record resulted from the ambiguity with which Citizens' exception was stated and from Citizens' failure to claim any preference in its exceptions to the examiner's conclusions, that ruling need not be revised, since our ruling on Community's exception No. C-3, which involves the same portions of the initial decision, clearly disposes of Citizens' present argument.

Broadcasting System, Inc., and Citizens Television Corp.; and on September 1, 1967, by Rochester Telecasters, Inc., *Are denied.*

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I would grant reconsideration and, for the reasons set forth in my statement with the decision, released August 3, 1967, herein (9 FCC 2d 249), grant the application of the Federal Broadcasting System, Inc.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,277

STAR TELEVISION, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,541

COMMUNITY BROADCASTING, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,542

CITIZENS TELEVISION CORP., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,543

FEDERAL BROADCASTING SYSTEM, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,544

HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,545

GENESEE VALLEY TELEVISION CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,546

MAIN BROADCAST CO., INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

No. 21,547

ROCHESTER TELECASTERS, INC., *Appellant*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*
FLOWER CITY TELEVISION CORP., *Intervenor*

Appeals From a Decision and Order of the Federal Communications Commission

---

Decided January 30, 1969

* * * * * * * * * *

Before PRETTYMAN, *Senior Circuit Judge,* and BURGER and LEVENTHAL, *Circuit Judges.*

PRETTYMAN, *Senior Circuit Judge:* These are appeals from a decision and order of the Federal Communications Commission, in which the Commission awarded a construction permit for a television broadcast station on Channel 13 at Rochester, New York. There are eight appellants in as many appeals, consolidated. The appeals are from a

Decision[1] and a Memorandum Opinion and Order[2] in which reconsideration was denied.

The case was enormously complicated and tedious. The channel was newly allocated to this location. Twelve applicants filed, and their applications were referred to an examiner for comparative hearing and decision. Her findings of fact in the consolidated proceeding were 253 finely printed pages in length. The applicant to which she recommended a grant (a combination of two applicants on a share-time basis) withdrew its application. Whereupon the Commission remanded, then withdrew the remand, held further oral arguments, rendered a decision in which it adopted the examiner's findings, made further findings, and rendered an award.

Appellants say the Commission failed to resolve all the issues raised by them, violated its policy statement in a number of respects, failed to give weight to certain derelictions or shortages of the successful grantee, ignored uncontradicted evidence, acted arbitrarily, did not apply the comparative criteria to all applicants—a total of sixteen points. They argue, *inter alia*, that, when the application of the initially successful grantee was withdrawn, the entire initial decision became meaningless and so the parties have been deprived of their right to have an examiner "pass upon their proposed findings and conclusions addressed to the factual situation as it actually exists." The last-stated contention is obviously untenable. Basic facts do not derive their characteristics from the conclusion one may draw from them. If the conclusion be changed, the underlying facts are not thereby changed. Even if the conclusion be withdrawn, the facts remain facts, and if they were correctly found the findings remain unchanged. In addition to this consideration on the point

---

[1] Flower City Television Corp., et al., 9 F.C.C.2d 249 (1967).

[2] 10 F.C.C.2d 718 (1967).

made by appellants, we note there was a reargument of the case after the withdrawal of the initially successful applicants.

We think we need not discuss any of the other contentions, with one exception. The noteworthy phase of the dispute concerns principally the procedural requirements in a decision in a comparative case. The Commission had developed guidelines, which it called "criteria" and which it used for comparative measurement purposes. In the course of usage these criteria acquired names. Thus, some of them are Area Familiarity, Integration of Ownership and Management, Broadcast Experience, Diversification of Control of Mass Media, etc. In the midst of the present proceeding the Commission published a "policy statement", in which, with vigorous internal discussion and difference of opinion but with considerable flexibility in the result, it discussed some criteria at length, others summarily, and described the policies it intended to follow in making comparative decisions.[3]

The reasoning of the Commission in the matter at bar may be a bit circuitous, but it is clear and amply supported by findings of fact and by the evidence. We pointed out in *Johnston Broadcasting Co.* v. *FCC*[4] the decisional process to be followed in disputes of fact. We said there should first be findings of basic facts, based directly on evidence; then there should be findings of ultimate facts, which are drawn from the basic facts; and then a conclusion should be given, based on the ultimate facts. In this concept of the process the basic facts should be drawn, at least initially, by the examiner, if there be one, since it is he who sees and hears the witnesses. In that opinion we said:

> "(5) Findings must be made in respect to every difference, except those which are frivolous or wholly un-

---

[3] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965).

[4] 85 U.S. App. D.C. 40, 175 F.2d 351 (1949).

substantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant."[5]

This latter clause did not mean, as appellants seem to contend, that the Commission must reach and state a comparison between each pair of applicants in respect to each criterion.[6] It meant findings in respect to each applicant as to every point of comparison suggested by a party, and then a composite consideration.

The Commission stated, clearly and emphatically, that it preferred Flower over all other applicants on the basis of broadcast experience. When a finding of preference "over all other applicants" is thus made, it is unnecessary to name separately each other applicant. In the case at bar a reading of the findings respecting the broadcasting experience of the several people scheduled to be in the management of each of the applicants shows clearly the reason for the preference of Flower on the point. The Commission, with all the facts before it in detailed findings, exercised a judgment which it was empowered to make. The basis for the choice is clear in the basic findings.

For reasons which it stated, the Commission gave each of the other applicants otherwise associated with the media of mass communication a substantial preference over Federal on that criterion (Diversification of Control of Media of Mass Communication). In respect to Participation in Station Operation by Owners (Integration of Ownership and

---

[5] Id. at 46, 175 F.2d at 357.

[6] Such a task would be burdensome to the point of the ridiculous in some cases, as in the present one. To compare each of eight applicants with each other applicant in respect to each of eight criteria would require 224 comparisons, according to our combinatorial analysis.

Management), Federal was substantially preferred over the other applicants, and among the other applicants Flower was ranked highest on this point. The Commission found no preference in respect to Proposed Program Service. In respect to the criterion Past Broadcast Service (the operation of broadcast stations in which the present applicants' principals held an ownership interest), three applicants presented evidence. The Commission gave a preference to one (Community) on this point and denied any to the other two. The Commission awarded a demerit to one applicant on account of a character deficiency of one of its officers. Upon the basis of the preferences thus awarded, and the demerit, the Commission had remaining for final comparison three applicants—Federal, Flower and Community. It preferred Flower to Federal because of the latter's existing radio stations. It preferred Flower to Community because of Flower's superiority in participation in station operation (*i.e.*, integration of ownership and management). It found this superiority not because the owners of Flower planned a greater amount of participation in its management but because they were much more and better experienced than were the owner-managers of Community. A reading of the detailed findings concerning the experience of each of the people involved shows clearly the grounds upon which the Commission made this finding.[7] We must keep in mind that we are not choosing a grantee. Our function has been described many times: We must understand the processes pursued by the Commission and test the validity of both the process and the conclusion.

We find no fault necessitating reversal.

Affirmed.

---

[7] The findings as to the personnel of Flower involved in this problem will be found in the *Flower City Television* decision, *supra* note 1, at 269, those of Community at 295, and those of Citizens at 322.

LEVENTHAL, *Circuit Judge, dissenting:* In view of all the time that has elapsed and paper that has been lodged, it is with some diffidence that I demur from this court's affirmance of the award by the Federal Communications Commission to Flower City Television Corporation (Flower) of the license for TV Channel 13, Rochester, New York. But I think the findings fail to support the order, in that the Commission failed to set forth its reasons for preferring Flower to Community Broadcasting Company (Community) and Citizens Broadcasting Company (Citizens). In my view sound principles of administrative law and judicial review require remand to the Commission.

I

It was in August 1961 that Channel 13, a VHF channel, was assigned to the area of Rochester, New York, sometimes called the Flower City. After applications to operate the channel were duly filed, a comparative hearing began in June 1962. It ended in December 1962. In January 1964 the Hearing Examiner filed an Initial Decision which included extensive findings. Without commenting on the qualifications of each applicant, except to note them, the Examiner, persuaded by the advantage of establishing an educational broadcast service in the area, decided upon an award to Rochester Area Educational Television Association, Inc. (RAETA) and Rochester Telecasters, Inc.[1]

On the basis of exceptions from other applicants, and an objection filed in amicus form by ABC, the Commission in May 1965 entered an order that reopened the record to explore, *inter alia,* the impact of a possible grant to RAETA on the objective of a competitive third network serv-

---

[1] These two applicants had proposed a share-time operation of channel 13 and their applications were treated as a single proposal. RAETA was to use the channel as a non-commercial educational station, and RTI was to use the balance of the time as a commercial ABC network affiliate.

ice.[2] At the same time each applicant was given the opportunity of bringing its application up to date to reflect involuntary changes and programming changes occasioned by changed needs of the community. The applicants entered into a series of negotiations, culminating in RAETA's withdrawal of its application.[3]

Meanwhile, on July 28, 1965, the FCC issued its *Policy Statement on Comparative Broadcast Hearings.*[4] On the withdrawal of RAETA the Commission determined that the instant proceeding could be decided on the basis of the record before the Examiner without further evidentiary submission and it vacated the remand. A second oral argument was held before the Commission on May 22, 1967, affording the parties another opportunity to focus on the relevant points in the record. The parties did not object to this procedure.

In making the award to Flower on August 3, 1967, five years after the hearing, the Commission adopted the Examiner's findings of fact but said that in view of RAETA's withdrawal "it is apparent that the findings in this proceeding now warrant substantially different conclusions and a different ultimate result."[5]

The Commission's opinion undertook to apply the criteria of its 1965 Policy Statement which set forth the criteria governing comparative hearings in regard to all fu-

---

[2] Memoranda opinions and Order, FCC 65-403, released May 13, 1965.

[3] RAETA now operates Station WXXI in Rochester, a UHF educational channel.

[4] 1 F.C.C. 2d 393 (1965).

[5] *Decision*, August 3, 1967, Application of Flower City Television Corp., FCC 67-924, 9 F.C.C. 2d 249, at 252. Reconsideration was denied by Memorandum Opinion and Order, 10 F.C.C. 2d 718 (Nov. 22, 1967). Commissioner Bartley and Commissioner Johnson dissented separately.

ture licensing orders.[6] Under three of the categories of criteria the Commission found explicitly that as between Flower, Community, and Citizens, none of them should be ranked preferentially. In connection with *Past Broadcast Record* Community was singled out for preference because of its "commendable record." In the area of *Participation in Station Operation by Owners,* Flower was ranked second after Federal. Flower's relatively high ranking here turned out to be crucial. The Commission concluded that the award should go to Flower despite Community's edge in *Past Broadcast Record.*

While the record suffices to show that Flower seems to be a satisfactory licensee, I think a remand is required because the Commission has failed adequately to justify its preference for the experience of Flower's participating owners, as opposed to that of the principals of Citizens and Community.

II

This court has consistently insisted on adequate findings and explanation in support of administrative decisions. In a careful opinion the court set forth the relevant criteria, with specific reference to the requirements for findings issued after comparative hearings:[7]

> (1) The bases or reasons for final conclusions must be clearly stated. (2) That conclusion must be a rational result from the findings of ultimate facts, and those findings must be sufficient in number and substance to support the conclusion. (3) The ultimate facts as found

---

[6] The categories are: *Diversification and Control of Media of Mass Communications; Full-Time Participation in Station Operation by Owners; Proposed Program Service; Past Broadcast Record; Efficient Use of Frequency; Character; Other Criteria.*

[7] Johnston Broadcasting Co. v. FCC, 85 U.S.App.D.C. 40, 46, 175 F.2d 351, 357 (1949).

must appear as rational inferences from the findings of basic fact. (4) The findings of the basic facts must be supported by substantial evidence. (5) Findings must be made in respect to every difference except those which are frivolous or wholly unsubstantial, between the applicants indicated by the evidence and advanced by one of the parties as effective. (6) The final conclusion must be upon a composite consideration of the findings as to the several differences, pro and con each applicant.

The Commission's findings do set forth the bare bones facts of the nature and extent of the broadcast experience of the principals involved.[8] What is lacking is the critical

---

[8] These findings, set forth in the Examiner's findings of fact, and adopted by the Commission may be summarized as follows:

FLOWER 9 F.C.C. 2d at 268-69.

Larson: 1926 - announcer and program director at Salt Lake City radio station; 1929 - producer-director for NBC radio network in New York; 1934 - independent radio producer; 1942 - 20% owner and general manager of District of Columbia radio station; 1945 - vice president and general manager for radio and television operations of the Philadelphia Bulletin; supervised application for and construction of Philadelphia TV station while television operations supervisor for Philadelphia Bulletin; 1953-1959 - President, general manager, and 20% owner of Salt Lake City radio-TV station.

Auchincloss: 1934 (at age 17) - summer job as announcer for Asbury Park radio station. Since 1943, he has been an independent writer, director, and producer in radio, television, and other fields.

CITIZENS 9 F.C.C. 2d at 322-25.

Fay: 1927 - studio manager at Buffalo radio station; 1928-1957 - general manager and officer of Rochester radio-TV station (TV since 1949).

Fraiberg: 1949 - sales manager and programming for San Francisco TV station; 1959 - assistant to vice president in

feature of justification or analysis explaining why the Commission deemed the background of Flower's executives to be preferable.

I do not for a moment suggest that the Commission must dot every "i" and cross every "t" in its conclusions. It is enough if a court can "discern the path" followed by the Commission.[9] And I *can* discern the path by which the Commission disposed of the applicants other than Citizens and Community. The Commission's reasons for rejecting Federal, Genesee and Heritage on grounds other than broadcast experience were amply stated, based on considerations that were within the purview of the Policy Statement, and supported by the record. As to Star, Main and RTI, the Examiner's basic findings make it reasonably clear to me that these applicants were substantially deficient in television broadcast experience as compared with Flower, Citizens or Community.

Agencies should not be compelled to labor the obvious.[10] Certainly the Commission is not required to formulate a comparison between each pair of applicants for each cri-

---

charge of television, Metropolitan Broadcasting Co. (Metromedia); 1963 - general manager of District of Columbia television station (now manager of WNEW-TV in New York).

COMMUNITY 9 F.C.C. 2d at 295-301.

Greene: 1934 - account executive of Buffalo radio stations; 1946 - national sales manager for Buffalo radio station; 1953 - assistant general manager of Buffalo radio station; co-owner of radio stations in North Carolina and Colorado; 1956 - co-owner and general manager of Rochester radio station.

Hanna: 1940-present - general manager of Cornell University AM-FM radio station.

[9] *See* Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 595 (1945).

[10] See my dissent in MG-TV Broadcasting Co. v. FCC, D.C. Cir. No. 21224, Dec. 20, 1968.

terion. A certain summariness of treatment is acceptable and necessary for relatively insubstantial matters. I do not quarrel with Judge Prettyman's observation in that context.

When we come to the issue of prior broadcast experience, however, we are manifestly concerned with a critical aspect of the hearing and decisional process, and the Commission cannot rely on bare conclusions without supporting findings unless the existence and content of those findings are virtually manifest.

Flower was rated superior in "participation in station operation by owners" to all applicants other than Federal (which was downgraded on the diversification criterion). What was the basis of that preferential rating? To borrow Commissioner Bartley's words, the Commission's decision virtually admits that "the fact that most of the Flower stock is held by persons with area familiarity and by persons who will devote some time to the operation of the station is also true of most of the other applicants."[11] The majority of this court accordingly projects that Flower's preference on this criterion rests not on a greater amount of owner participation in management, but on the fact that Flower's owner-managers were much more and better experienced than those of the other applicants.

Let us begin by comparing Flower and Citizens—reserving discussion of Community because that involves still another serious problem with the findings. All the Commission says is: "Among the other parties with substantial integration, Flower ranks the highest, in view of the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser experience of Gordon Auchincloss II."[12]

---

[11] 9 F.C.C. 2d at 261.

[12] 9 F.C.C. 2d at 254.

If the Commission had stated why it preferred Flower's principals to Citizens' in regard to experience, I might be able to say—yes, those reasons are supported by the record and they seem reasonable. But in the absence of such comparative findings by the Commission, the Commission's reasons for preferring Flower are neither obvious nor "discernible" so far as I am concerned, even after attentive study of the evidentiary findings.

The evidentiary findings do show that Flower's principals had extensive broadcast experience. Flower's proposed general manager, Larson, had started in radio in 1926 and had remained in the commercial communications field until 1958. His most recent experience had been as president, stockholder, and general manager of a Salt Lake City radio and television station. The proposed program director, Auchincloss, had been a writer, director, and producer in television, radio and other fields since 1943.

However, the principals of Citizens likewise had extensive television broadcast experience on which the Commission failed to comment. Fay began in radio in 1927 and had been continually engaged as an officer and general manager of a *Rochester* radio and television station until 1957. Fraiberg began his television career in 1949, had been general manager of two television stations, and was still employed as a general manager when the Commission made its award. It is significant, moreover, that his experience embraced management of a TV station in a large metropolis.

It is possible that, for reasons undiscernible by me, the Commission could reasonably have concluded, *e.g.*, that Larson's background as a producer is more significant than Fraiberg's executive experience (though *a priori* I would have supposed exactly the reverse), or that Larson and Auchincloss make a better "team" than Fraiberg and Fay, or have associations of better quality. Any such conclusion with supporting evidentiary findings might have been an

acceptable ground for decision. But the Commission put forth only a peremptory conclusion which, in my view, was not adequately supported.

Turning now to Community, there is applicable here, *pari passu,* all that I have noted in discussion of Citizens with regard to the gaps in the findings, and the lack of reasoned judgment and analysis as to comparative experience of Messrs. Greene and Hanna.

But there is more, for Community was entitled to a credit for its past broadcast record. The significance of this is heightened by the Commission's determination, in line with the express comment in the Policy Statement, that no such credit is available for average performance, a standard that led to the denial of a preference to Star or Federal on this point. What is required is "such an unusual degree of attention to the public's needs and interests as to establish an unusually good past broadcast record." (9 F.C.C. 2d at 255). Community met this test. The Commission said: "Community has made a showing concerning the broadcast record of station WHAM during the period its 15 percent stockholder, F. Robert Greene, was 50 percent owner and general manager of that station." And after recounting some aspects of that station's outstanding performance the Commission said: "In view of the facts that Greene was general manager and an owner of WHAM during this period and that Greene proposes to be in an active full-time supervisory capacity in Community's proposed station, we are convinced that Community must be given credit for the commendable record of performance compiled by WHAM while Greene was associated with it." (9 F.C.C. 2d at 253).

Because of this factor, Commissioner Johnson would have given the award to Community. That is of course not decisive. But it suggests that more was required than was provided by the Commission when it summarily said: "We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This

superiority arises from the experience factor." (9 F.C.C. 2d at 256).[13] When executives responsible for an outstanding past broadcast record are given a relatively low rating on ground of comparative broadcast experience, there would seem to be a situation which may possibly exist[14] but should not be asserted in the absence of reasoned comment and explanation. No such comparative comment was provided here.

There may be a clue to what the Commission had in mind in its concluding remark: "We feel that Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community itself, but rather of a 15-percent stockholder (and proposed general manager) who was a 50-percent owner of the station whose record is involved." (9 F.C.C. 2d at 257). This was reiterated on rehearing. (10 F.C.C. 2d at 719).

This seems to be a distortion of a more meaningful admonition in the *Policy Statement:*

> If a past record warrants consideration, the particular reasons, if any, which may have accounted for that

---

[13] The Commission also said (pp. 256-257): "(We note that Community's participating stockholders also lack area familiarity)." The use of parentheses reinforces the text in indicating this was a make-weight. The evidentiary findings make clear that while Flower has stockholders familiar with the Rochester area, none of them plan full-time participation in station affairs. In the Policy Statement the Commission said that only a "slight credit" would be given for local residence of persons with ownership interests who will devote "some time" but "cannot be considered as actively participating in station affairs on a substantially full-time basis." (1 F.C.C. 2d at 396).

[14] *E.g.*, there may be newcomers whose experience will be taken into account in assessing participation by owners even though their prior activity "would not qualify as a past broadcast record, *i.e.*, where there was not ownership responsibility for a station's performance." *See* 1 F.C.C. 2d at 396.

> record will be examined to determine whether they will be present in the proposed operation. For example, an extraordinary record compiled while the owner fully participated in operation of the station will not be accorded full credit where the party does not propose similar participation in the operation of the new station for which he is applying.[15]

Is the Commission saying that a 15 percent interest in the TV station was insufficient incentive to bring forth the ability and acumen that resulted in the outstanding record of Greene's station? It should be noted that Larson's interest is only 10 percent, and Auchincloss's is only 8.33 percent. Whatever the rationale, if any, for discounting Community's past record, the court ought not have to grope for the policy the Commission sought to further. *See Radio Station KFH Co.* v. *FCC*, 101 U.S. App. D.C. 164, 247 F.2d 570 (1957).

III

While a hearing examiner who has "lived with a case"[16] might have based a conclusion on the presence and acumen displayed by the various principals during the hearings, the Commission decided without the benefit of any pertinent examiner recommendation. I do not say the Commission necessarily erred in proceeding without further evidentiary hearings. However, its task was made more difficult by the lack of evidentiary findings of an examiner (or intermediate decision of a review board) purposefully addressed to the pending applicants. The Commission's obligation to provide findings meaningfully related to its result was enlarged accordingly.

---

[15] 1 F.C.C. 2d at 398.

[16] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

I frankly put to myself this question, Should the courts continue to adhere to the approach of requiring the agency to develop a meaningful statement of reasons for a function like this, of choosing the best qualified among several competing applicants? Maybe an agency cannot meaningfully say more than why it screens out those applicants who fall by the wayside due to "demerits" in some prominent category, or who are plainly second best for some reason. Maybe all it can do as to the other applicants is say: These applicants are all reasonably qualified; we have no meaningful way of choosing on principle between them; all we can really do is speculate who will do the best job in the public interest; and our best possible hunch is X. I believe Justice Frankfurter has applied to the concept of administrative expertise the phrase of Justice Holmes[17] concerning intuition that outruns analysis.

The possibility that an agency may come to the point of resting on intuition is all the greater when it is recalled that there are no doctrines of burden of proof such as are available for decision of court cases when the proof stands in equipoise.

I for one would be prepared to sustain an action presented with such candor, but pause in saying that, to note that such a candid disclaimer would perhaps crystallize other and more acceptable solutions. Perhaps the Commission could advise the two or three applicants who survive after the first winnowing that they are in a run-off and now have the oportunity to enlarge the record in a more focused way. Perhaps the parties could settle the case. Perhaps a lottery could be used, for luck is not an inadmis-

---

[17] Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U.S. 585, 598 (1907).

sible means of deciding the undecidable, provided the ground rules are known in advance.[18]

But all that is by the way, or perhaps for another day. In the case before us the Commission did not throw up its hands, so to speak. It purported to act in terms of reason, and I at least do not feel that I know the reason. "The administrative process will best be vindicated by clarity in its exercise."[19] I have general faith, notwithstanding some previous observations, that the public interest is best served by insisting that those who hold the trust of public office discharge their function with a conscientious statement of reasons, at least in matters adjudicated upon formal submission in an adversary process. This promotes confidence that decisions are unbiased and not arbitrary.[20] The requirement of findings and explanations, which are intended to assure neutrality and rationality, is enshrined in the core of our administrative law and the Administrative Procedure Act.[21] It should not be eroded with lip service.

---

[18] For example, lot has been used for selection of bonds for redemption; designating location of candidates on an election ballot; designating which of the newly elected members of a body (*e.g.*, D.C. School Board elected in 1968) shall have a 1-year and which a 3-year term. Examples could readily be multiplied. Judicial machinery makes deliberate use of chance in selection of representative juries.

[19] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

[20] *Compare* J. Frank, "Law and the Modern Mind" (New York, 1963). The need to state reasons in opinions helps to eliminate irrelevant prejudice and arbitrary decisions, and may also force a trier of fact and law to grapple with unconscious preferences, and to articulate and place in perspective the preferences that shape his decisions.

[21] *See* section 8 of the Administrative Procedure Act, 5 U.S.C. § 557 (Supp. III, 1968).

IV

A final word on the role of the court in relation to the administrative process is here appropriate to place my dissent in perspective. I have already noted that a court should be sensitive to the demands on the time of busy administrators, that it is unrealistic to require—or expect dotted "i's" and crossed "t's," that it is enough to be able to "discern" the "path" followed by the administrator even when a decision leaves something to be desired.[22]

Yet the judiciary must not abdicate its function of enforcing substantive and procedural requirements, what Professor Jaffe calls the "supervisory" function.[23] For the moment at least the Rochester public is being served in terms of service.[24] In the long run, the general public will benefit from attentive judicial insistence on the essentials of the administrative process. Insistence on articulated reasons helps assure that our agencies are selecting those licensees who will best serve the public and in a broader sense, enables the public to repose confidence in the judgment of its decision-makers. I would remand for further consideration and findings.

---

[22] *See* Colorado Interstate Gas Co. v. FPC, *supra* note 10; MG-TV Broadcasting Co. v. FCC, *supra*, note 10 (dissenting opinion).

[23] *See* Jaffe, "Judicial Control of Administrative Action" at 589 (1965): "... the effectiveness of judicial supervision should be judged not only in terms of the case which correction was administered, but in its effect on doctrine in the long run."

[24] At this time an interim sharing operation is in effect whereby the competing broadcast groups are jointly managing the station. While these enforced joint ventures often do not prosper because no one participant feels it has a long-term commitment to the success of the enterprise, in this instance the participants are working harmoniously and the effort is flourishing.

Judgment

These cases came on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

On Consideration Thereof, It is ordered and adjudged by this Court that the Decision and Memorandum Opinion and Order of the Federal Communications Commission appealed from in these cases be, and they are hereby, affirmed.

Per Curiam

For the Court:

Nathan J. Paulson
Nathan J. Paulson
Clerk

Dated: January 30, 1969.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Washington, D. C. 20001

April 1, 1969

Nos. 21,277 & 21,541-21,547—*Star Television, Inc.* v. *F.C.C.*

Gentlemen:

Enclosed is copy of the order denying your petition for rehearing. Your suggestion that this case be reheard *en banc* was transmitted to the full Court, and the purpose of this letter is to inform you that there not being a majority of the judges in regular active service in favor of having this case reheard *en banc*, it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,
NATHAN J. PAULSON
Nathan J. Paulson, Clerk

By: ALEXANDER L. STEVAS
Alexander L. Stevas
Chief Deputy Clerk

ALS/gb
Encl.

Order

On consideration of appellants' petitions for rehearing in Nos. 21,277, 21,541, 21,542, 21,543, 21,544 and 21,546, it is

ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam.

Circuit Judge Leventhal would grant appellants' petitions for rehearing.

SUPREME COURT, U. S.

SEP 25 1969

JOHN F. DAVIS, CLERK

Nos. 285 and 532

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

STAR TELEVISION, INC., COMMUNITY BROADCASTING, INC., CITIZENS TELEVISION CORPORATION, HERITAGE RADIO AND TELEVISION CO., INC., and MAIN BROADCASTING CO., INC., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT FLOWER CITY TELEVISION CORPORATION IN OPPOSITION

THOMAS N. DOWD
HAROLD DAVID COHEN
J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1000 Ring Building
Washington, D. C. 20036

Attorneys for Respondent Flower City Television Corporation

Washington, D. C. · THIEL PRESS 202 393-0625

INDEX

	Page
Questions Presented	1
Statement	2
Argument	8
Conclusion	17

CITATIONS

Cases:

Baltimore and Ohio Railroad Co. v. United States, 298 U.S. 349 (1936) 16

Colorado Radio Corp. v. Federal Communications Commission, 73 U.S.App.D.C. 225, 118 F.2d 24 (1941) 9

Federal Communications Commission v. WJR, The Goodwill Station, 337 U.S. 265 (1949) 10

Federal Trade Commission v. Mary Carter Paint Co. 382 U.S. 46 (1965) 11, 14

Fischer v. Federal Communications Commission, D.C. Cir. No. 21,942, decided July 14, 1969, slip opinion 9

National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344 (1953) 16

Norris & Hirshberg v. Securities and Exchange Commission, 82 U.S.App.D.C. 32, 163 F.2d 689 (1947) 10

Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S.App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956) 11, 17

Sanders Bros. Radio Station v. Federal Communications Commission, 70 U.S.App.D.C. 297, 106 F.2d 321 (1969), rev'd, 309 U.S. 470 (1940) 10

Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S.App.D.C. 13, 189 F.2d 677, cert. denied, 342 U.S. 830 (1951) 16

United States v. Abilene & Southern Ry. Co., 265 U.S. 274 (1924) 10

United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515 (1946) 16

Page

Statutes and Rules:

Communications Act of 1934, as amended, Section 4, 47 U.S.C. § 154 10

FCC Rules and Regulations, 47 C.F.R., Sections:

1.65 11

1.258 10

1.513 10

1.522 ..... 10, 11

Other:

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 2, 3, 6, 8, 9, 11, 12, 13, 14, 15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

No. 532

STAR TELEVISION, INC., COMMUNITY BROADCASTING, INC., CITIZENS TELEVISION CORPORATION, HERITAGE RADIO AND TELEVISION CO., INC., and MAIN BROADCASTING CO., INC., *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION and FLOWER CITY TELEVISION CORPORATION, *Respondents.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT FLOWER CITY TELEVISION CORPORATION IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission acted reasonably in not considering an untimely and otherwise procedurally deficient offer by an applicant for a television station to dispose of its radio station in the same community in a last-minute attempt to enhance its comparative posture vis-a-vis the other applicants.

2. Whether the Commission, in comparing the merits and demerits of several competing applicants for a television license, acted reasonably in applying its *Policy Statement on Comparative Broadcast Hearings.*

3. Whether the basis for the Commission's choice of the winner in a comparative television case was adequately articulated in the Commission's decision?

STATEMENT

The petitions in Nos. 285 and 532 challenge the validity of a decision by the Federal Communications Commission in which Flower City Television Corporation (Flower City) was selected over eight other mutually-exclusive applicants for a construction permit to operate a television broadcast station on Channel 13 in Rochester, New York.

The competing applications[1] were filed in September and October 1961 and on November 21, 1961 were designated for hearing before a Hearing Examiner. Following 70 days of hearings between June and December 1962, the Hearing Examiner issued a 270-page Initial Decision on January 22, 1964 (9 F.C.C. 2d 264). The Examiner chose as a combined winner two of the applicants (RAETA and RTI) who proposed a share-time arrangement for using the channel.

The Examiner's conclusions covered the television needs and services in the Rochester area; the area familiarity of each of the applicant's principals; the integration of ownership and management proposed by each applicant; the

---

[1]Originally there were 12 applicants for the channel: the six petitioners (each referred to in abbreviated form hereinafter), respondent Flower City, Genesee Valley Television Co., Inc., Rochester Area Educational Television Association, Inc. (RAETA), Rochester Telecasters, Inc. (RTI), Rochester Broadcasting Corporation and Ivy Broadcasting Company. The latter two parties did not prosecute their applications. (Initial Decision, 9 F.C.C. 2d at 265 & n. 1.)

broadcast experience of each applicant's principals; the extent of diversification of control of mass media of communication as it related to each applicant; the past broadcast record of each applicant; the efforts of the applicants to determine broadcasting needs and to plan programs accordingly, as well as their proposed programming; and other comparative matters.

Exceptions to the Initial Decision were filed, followed by oral argument before the Commission *en banc* on November 2, 1964, at which time the parties again addressed themselves to the comparative merits of the several applications.

After hearing oral argument, the Commission concluded that the existing record did not contain sufficient evidence for the determination of whether a part-time applicant such as RTI would provide an effective outlet for a third competitive network service (which all of the applicants proposed to provide) and whether alternative means were available for broadcasting the type of educational programming proposed by RAETA. Accordingly, the record was reopened to adduce further evidence on these issues. At the same time, the Commission indicated that each applicant would be permitted to modify its programming proposal to reflect the evolving needs of Rochester. (FCC 65-403, released May 13, 1965.)

Following this remand to a hearing examiner, the parties entered into negotiations with RAETA, as a result of which RAETA dismissed its application with Commission approval and subsequently commenced operation of a full-time educational station on UHF Channel 21 in Rochester.

In an order released April 21, 1966 (FCC 66-347), the Commission set aside the remand order on the ground that no useful purpose would be served by further hearing on the matters specified, in view of RAETA's withdrawal and the Commission's adoption of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965), the latter having included guidelines for Commission con-

sideration of planning, preparation and proposed programming in comparative hearings. The April 21, 1966 order recited that it appeared to the Commission

> "that all matters of decisional significance in this proceeding are in the present record, that further hearings would serve no useful purpose and that it would be more conducive to the Commission's orderly processes for the Commission to decide this proceeding on the basis of the present record. . . ."

None of the applicants made any objection to this order of the Commission setting aside its earlier remand order. Nor did any of them make any move to supplement the record or the Initial Decision.[2]

Further oral argument was heard on May 22, 1967. At that time, in summarizing their positions on the comparative aspects of the case, the applicants reviewed the record and commented upon pending petitions for amendment of applications. The applicants also argued several procedural points (not raised by the instant petitions before the Court). In the course of a lengthy presentation at this oral argument (Tr. 9929-41), counsel for Federal stated (Tr. 9931, 9933) that if there was objection to the fact that Federal already owned a radio station in Rochester, it was willing to dispose of it on such terms and conditions as the Commission directed.[3]

On August 3, 1967, the Commission adopted the Decision which is the ultimate subject of the petitions before the Court (9 F.C.C. 2d 249, Pet. Appendix, p. 1a *et seq.*).

---

[2]Previously, on November 29, 1965, RTI had requested leave to amend its application to specify full-time operation and to alter its financial proposal.

[3]On March 8, 1968, while the eight appeals by losing applicants were already pending before the Court of Appeals for the District of Columbia Circuit, Federal tendered to the Commission an amendment to its application, stating that it was willing to dispose of its Rochester station.

After outlining the procedural history of the case, the Decision, in advance of a detailed comparative evaluation of the applicants, covered the following matters:

(a) It held that the Examiner's findings of fact were substantially accurate and complete, and they were adopted with modifications noted in the Decision and in an appendix of rulings on every exception taken by the parties. Because of the withdrawal of RAETA, the Commission stated that "the findings in this proceeding now warrant substantially different conclusions and a different ultimate result" (par.5).

(b) It stated that "each of the applicants has met its obligations" to be familiar with and ascertain the needs and interests of the area to be served, and that "variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs" (par. 3).

(c) It held that the evidentiary showings of RAETA's specialized programming submitted pursuant to a subissue concerning unfulfilled programming needs—which subissue was added upon RAETA's petition for enlargement—were mooted by the dismissal of RAETA's application and the subsequent commencement of operations of educational station WXXI (par. 3, n. 3).

(d) It granted unopposed pending petitions for leave to amend the applications of Flower City, Star and Heritage to reflect already-effected changes regarding certain principals (par. 6(a), (b) (d)). Community and Flower City had in writing notified the Commission of effectuated changes regarding certain principals, and these facts were noted (par. 6(c) & n.5). Also, upon reconsideration of a previously denied petition for leave to amend, RTI was permitted to specify full-time operation without otherwise altering its comparative qualifications (par. 6(e)).

The Commission then undertook an evaluation of the applicants on the basis of several traditional comparative cri-

teria: diversification of the media of mass communication, participation in station operation by owners (otherwise known as integration of ownership and management) and past broadcast record, as well as other criteria (par. 7, 8, 10-12). No preference was awarded on proposed program service (preparation, staffing, program policies and proposals) because the Commission concluded that all of the applicants had met their obligations in this respect, and, in accordance with the 1965 *Policy Statement*, ordinary differences in judgment would not be compared (par. 9; see par. 3).

In its final weighing of preferences and demerits, the Commission stated:

> "13. We believe that the public interest would best be served by a grant to Flower. We conclude that no preferences are warranted with respect to the proposed program services and the efficient use of this television channel. * * * We find no significant difference among the applicants on diversification of control of mass communications media, except that, as pointed out above, Federal has other broadcast interests, including station WSAY in Rochester. The other important factors involved in this case are participation in station operation by owners and past record. On participation we have preferred Federal with Flower second, and on past record have given a preference to Community above all of the other applicants. We believe that Flower is to be preferred to Federal because of Federal's existing broadcast interests; we feel that the public's interest in a television station in Rochester which will provide an entirely new viewpoint in broadcasting not associated with any existing station is more important than the greater ownership participation which would be provided by Federal. We prefer Flower to Community because of Flower's superiority in the area of participation in station operation. This superiority arises from the experience factor. (We note that Community's participating stockholders also lack area familiarity.) We feel that

> Community's past record, while commendable, has not been shown to be so outstanding as to warrant substantial weight, since the past record is not that of Community, itself, but rather of a 15-per cent stockholder (and proposed general manager) who was a 50 per cent owner of the station whose record is involved. For the foregoing reasons we have determined to make the grant to Flower."

Commissioners Bartley and Johnson dissented in separate statements. Commissioner Bartley differed with the majority on the significance to the public interest of single ownership of AM-FM-TV broadcast stations in the same city. Thus, he would have assessed against Federal only a "slight" demerit on the factor of diversification of control, and he would have awarded it the overall preference by virtue of its superiority on the ownership-management integration factor. (Pet. Appendix, pp. 19a-21a.) Commissioner Johnson, on the other hand, agreed with the majority that Federal suffered a "substantial" detriment because of its ownership of other broadcast stations in the Rochester area. He stated, however, that while the Commission's choice of Flower City is "quite satisfactory," and his own preference is "not a strong one"—

> "Forced to vote for one of these nine applicants, I would choose Community Broadcasting, Inc. Community ranks well down the list in the integration factor. But, as the Commission notes, it deserves a preference for its past broadcast record."

(Pet. Appendix, pp. 21a-23a.) Neither of the dissenting Commissioners challenged the legality of the Commission's choice or manner of choice.

All of the unsuccessful applicants except Star filed petitions for reconsideration. In a Memorandum Opinion and Order adopted November 22, 1967 (10 F.C.C. 718, Pet. Appendix, p. 24a *et seq.*), the Commission adhered to and expanded upon its evaluation of the applicants and ultimate preference of Flower City under the comparative criteria (par. 2-4). It denied as untimely and unfair a post-Decision

petition by Citizens for leave to amend its application regarding the management participation by one of its stockholders (par. 7 n. 2), and it also explained that Community had been given no credit in the Decision for a late-filed promise of greater participation by one of its stockholders (*ibid.*).

The court of appeals on January 30, 1969 affirmed the Commission action. Judges Prettyman and Burger were of the opinion that the Commission had adequately reflected in its Decision the reasoning by which it reached a preference for Flower City on what turned out to be the critical factor of the owner's participation in the management of the station. They stated that "[a] reading of the detailed findings concerning the experience of each of the people involved shows clearly the grounds upon which the Commission made this finding" (Pet. Appendix, p. 36a). Judge Leventhal dissented on this point.

Neither the majority nor the minority opinion mentions Federal's claim of error based on its last-minute offers to dispose of its Rochester radio station, if such would help its case. Both opinions likewise rejected *sub silentio* the arguments made below by the other applicants that the Commission had violated its 1965 *Policy Statement on Comparative Broadcast Hearings*, and, further, that it should have given preferences to some applicants because of their proposed programming and ascertainment of community needs.

On April 1, 1969, petitions for rehearing and suggestions for rehearing *en banc* were denied by the court of appeals (Pet. Appendix, p. 51a).

ARGUMENT

The errors asserted in these petitions to have been committed below are not of the kind which warrant review by this Court. No important unsettled question of law is presented; and no conflict in decisions of lower courts is involved.

I.

Federal, the petitioner in No. 285, urges this Court to intercede because the Commission refused to regard a representation by Federal's counsel at final oral argument—to the effect that it would dispose of its radio station in Rochester if this was deemed an adverse factor—as eliminating a weakness which had been manifest in Federal's application for six years and which had formed an integral part of the other applicants' cases against Federal. Although this alleged error on the part of the Commission was also argued by Federal in the court below, it failed to elicit even a comment in either the majority or the dissenting opinion. The Commission's unwillingness to give any weight to Federal's belated and procedurally defective attempt to shore up its weak application was required by concern for due process to which the other applicants were entitled and, at the very least, represented a determination clearly within the administrative discretion of the Commission.

Federal was inexcusably untimely and otherwise deficient procedurally in the manner in which it sought to influence the Commission decision by an attorney's passing statements at oral argument. The applicants had finalized their proposals several years previously, and they had engaged in a protracted and complicated hearing on the basis of those proposals. "The Commission is not required to play games with applicants."[4]

Federal's contention that it had not previously been given an opportunity to amend its application in light of the July 1965 *Policy Statement* (Pet. Br., No. 285, p. 19 & n. 24)—even assuming *arguendo* that the latter effected a substantial change—is belied by the fact that, after the *Policy Statement* was issued and prior to the 1967 oral argument, Federal,

---

[4] Fischer v. Federal Communications Commission, D.C. Cir. No. 21,942, decided July 14, 1969, slip opinion, p. 7; *cf.* Colorado Radio Corp. v. Federal Communications Commission, 73 U.S. App. D.C. 225, 227, 118 F.2d 24, 26 (1941).

had almost two years in which to file a written petition for leave to amend its construction permit application pursuant to the Commission's Rules and Regulations (47 C.F.R. § 1.522(b)) and/or to supplement the closed hearing record (see 47 C.F.R. § 1.258) with its new proposal. Under either procedure, competing applicants would have had an opportunity to state their opposition to and cross-examine (or otherwise test) Federal's proposal.

Under well-established Commission practice, an attorney may not sign a license application or an amendment to an application for his client (47 C.F.R. § 1.513). Certainly, Federal counsel's attempt to accomplish such an amendment through his oral argument contravened the policy underlying that rule. In providing that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" (Communications Act of 1934, as amended § 4(j), 47 U.S.C. § 154(j)), Congress "left largely to its [the Commission's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate those ends." *Federal Communications Commission v. WJR, The Goodwill Station*, 337 U.S. 265, 282 (1949). Furthermore, oral argument is not a part of the evidentiary record to which, by due process considerations, the Commission was confined in making its findings and decision regarding the proposals of the applicants.[5]

Federal relies on a false premise when it states that the *Policy Statement* made such a substantial change in Commission policy to promote diversification of control of communications mass media that it was entitled to re-shape its

---

[5] United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 288-89 (1924); Sanders Bros. Radio Station v. Federal Communications Commission, 70 U.S. App. D.C. 297, 302-03, 106 F.2d 321, 326-27 (1939), *rev'd on other grounds*, 309 U.S. 470 (1940); Norris & Hirshberg v. Securities and Exchange Commission, 82 U.S. App. D.C. 32, 36-37, 163 F.2d 689, 693-94 (1947).

case in light of that change. In point of fact, diversification had been one of the Commission's principal comparative criteria for many years before the *Policy Statement*. The Commission described the *Policy Statement* as "[a] general review of the criteria governing the disposition of comparative broadcast hearings. . ." (1 F.C.C. 2d at 393). "As in the past, we will consider both common control and less than controlling interests in other broadcast stations. . ." (1 F.C.C. 2d at 394). Further, the fact that the Commission from time to time may change its emphasis upon the various factors which it employs to find the public interest does not entitle an applicant to retry his case on the basis of the latest expression of views from the Commission.[6]

Federal is also in error in equating its proposal to divest itself of its conflicting broadcast interests with certain post-hearing changes of other applicants which were noted by the Commission in its Decision (Pet. Br. No. 285, pp. 20-21). All of the changes of the other applicants had been alredy effected (with two exceptions concerning Community and RTI, mentioned in the next sentence and footnote), *and* the Commission had been notified in writing pursuant to Commission regulations, either through a request for leave to amend an application (47 C.F.R. § 1.522(b)) or by notification of a significant change in information furnished in the application (47 C.F.R. § 1.65). The Comission rejected as untimely and unfair late-filed *proposals* by Citizens and Community, even though the proposals had been made in appropriate pleadings. (Pet. Appendix, p. 27 a, n.2).[7]

---

[6]See Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46 (1965); Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S.App.D.C. 236, 230 F.2d 204, *cert. denied*, 350 U.S. 1007 (1956).

[7]Even in granting RTI's 1965 petition to amend its application to specify full-time operation (instead of the share-time arrangement with RAETA, which had withdrawn), the Commission made clear that this change would not alter RTI's comparative qualifications (Pet. Appendix, pp. 7a-8a).

Since Federal did not attempt to introduce its proposal into evidence, or to tender it in a written pleading to the Commission—either before the Decision or before reconsideration thereof—the Commission cannot be faulted for not having given to Federal the "rational explanation" which it demands (Pet. Br., No. 285, p. 23).

II.

In No. 532, the petitioners seek to call into question the rationality of the Commission's comparative process. There were no differences within the Court below as to the validity of the Commission's interpretation of its *Policy Statement on Comparative Broadcast Hearings* in this particular case, and the Commission's interpretation of its *Statement* cannot be elevated to an issue of general importance as urged by petitioners.[8] Nor was there any denial of the principle urged here by petitioners— that the Commission, in a comparative television case, is required to give reasons or explanation for its conclusions. The point on which Judge Leventhal dissented concerned essentially the degree of explanation required of the Commission in the particular factual context in order to clarify the bases for its decision. The difference between Judges Prettyman and Burger, on the one hand, and Judge Leventhal, on the other, is that the majority thought the Commission's bases for choosing Flower City were sufficiently evident from a reading of the Commission's analytical paragraphs and the basic findings

---

[8]One of petitioners' charges in this respect—that the Commission deviated from its established policy, and specifically its 1965 *Policy Statement*, when it declined to rank the applicants on programming surveys and proposals (Pet. Br., No. 532, pp. 16-19)—was not raised before the court of appeals and therefore should not be considered here. Instead, in the court below, they argued unsuccessfully that the Commission, having designated hearing issues on those matters, had denied certain applicants due process by not awarding preferences thereon. (Brief for Appellants, D.C. Cir. Nos. 21,277, 21,541-47, March 18, 1968, pp. 47-55; compare *id.* at 55-70).

of fact which it adopted (Pet. Appendix, pp. 34a-36a), whereas Judge Leventhal was of the opinion that the analysis had not been articulated in sufficient depth by the Commission.[9] The degree of difference between the two views is not a matter calling for review by this Court.

While petitioners urge the Court to review the manner in which the Commission's *Policy Statement* was applied to the facts of this particular comparative proceeding, it may be noted that the legality of the *Statement* itself is not challenged. The Court is invited by petitioners to find that, even though the Commission purported to adhere to the *Statement*, it did not in fact do so in this case. A critical point, ignored by petitioners, is the function of the *Policy Statement*. They would apparently have the Commission give the *Policy Statement* a formulistic interpretation in applying the ownership-management criterion. The essence of the Commission's duty, however, is to weigh a number of factors, the significance of which are determined by the facts adduced in the particular proceeding.[10]

All seven members of the Commission at the time of the issuance of the *Policy Statement* gave notice in their several opinions that particular cases would require particularized treatment of the criteria. The majority's statement also

---

[9] Although Judge Leventhal could "discern the path by which the Commission disposed of the applicants other than Citizens and Community" (Pet. Appendix, p. 41a), he, unlike the court majority, did not believe that the Commission had clearly enough set forth the premises underlying its reasons for preferring Flower City over Citizens and Community.

[10] In adopting the *Policy Statement*, the Commission recognized that: "* * * The hearing and decision process is inherently complex, and the subject does not lend itself to precise categorization or to the clear making of precedent. The various factors cannot be assigned absolute values, some factors may be present in some cases and not in others, and the differences between applicants with respect to each factor are almost infinitely variable." (1 F.C.C. 2d at 393.)

recognized that there might be changes in Commission membership—as there have been—and in the views of the individual members (*ibid.*). Realistically, then, even a clear departure from the literal word of the *Policy Statement* would not necessarily constitute a change in basic policy.[11]

In the proceeding at bar, the Commission followed guidelines, but evaluated, as it must, the substance and meaningfulness of the relevant attributes of each applicant to determine which would be most likely to operate in the public interest. Petitioners are displeased with that evaluation, but they have not shown that it was an unreasonable one in the light of the *Policy Statement.*

The Commission has never indicated, as petitioners imply (Pet. Br., No. 532, p. 15), that owner-management integration is to be evaluated primarily in terms of the percentage of the company's stock owned by the managers.[12] The Commission concluded that "all of the applicants, with the

---

[11]The Court followed this reasoning in upholding a Federal Trade Commission finding of deceptive advertising even though the FTC's "Guides Against Deceptive Pricing" appeared to permit the kind of advertising in question. In that case, Federal Trade Commission v. Mary Carter Paint Co., 382 U.S. 46, 47-48 (1965), the Court stated:

> "These, of course, were guides, not fixed rules as such, and were designed to inform businessmen of the factors which guide Commission decision. Although Mary Carter seems to have attempted to tailor its offer to come within their terms, the Commission found that it failed; the offer complied in appearance only."

[12]Moreover, the percentages stated for petitioners Main and Community are twice the accurate figures, because they include stock owned by certain less-then-fulltime stockholders, contrary to the representation by petitioners (see Initial Decision, 9 F.C.C. 2d at 525-26). It is also a fact of record that Auchincloss, one of Flower City's fulltime managers, is a member of the Sibley family group which owns 20.83 percent of Flower City stock (Initial Decision, 9 F.C.C. 2d at 267), in addition to the 10 percent ownership of Larson, Flower City's other fulltime manager.

exception of Genesee and Heritage, proposed full-time participation by a substantial percentage of the stock ownership. . ." (Pet. Appendix, p. 9a).

All of the petitioners' other objections to the Commission's application of the *Policy Statement* on this factor (Pet. Br., No. 532, pp. 15-16) have already been answered in the Decision. The Commission preferred the past broadcast experience of Flower City's fulltime participating stockholders and decided that this experience was controlling, because the significance of the local residence subcriterion—on which Flower City was excelled by certain other applicants—was diminished by other positive characteristics possessed by Flower City (Pet. Appendix, pp. 9a-10a).[13]

Petitioners also charge the Commission with having failed to give preferences to certain applicants for ascertaining community needs and proposing programming to meet those needs (Pet. Br., No. 532, pp. 15-19). They insist that the Commission adopted a policy assigning importance to these factors and then proceeded in this case to ignore them. But in the *Policy Statement*, the Commission stated that "[d]ecisional significance will be accorded only to material and substantial differences between applicants' proposed program plans" (1 F.C.C. 2d at 397).[14] In this proceeding,

---

[13] In this context petitioners assert that the Commission "ignored the fact" that Community received a credit for its past broadcast record. The factor of past broadcast record was given separate consideration by the Commission (Pet. Appendix, pp. 10a-12a), and was weighed in the final evaluation of the applicants (Pet. Appendix, pp. 13a-14a).

[14] "The importance of program service is obvious. The feasibility of making a comparative evaluation is not so obvious. Hearings take considerable time and precisely formulated program plans may have to be changed not only in details but in substance, to take account of new conditions obtaining at the time the successful applicant commences operation. Thus, minor differences among applicants are apt to prove to be of no significance." 1 F.C.C. 2d at 397.

the Commission adopted the Hearing Examiner's extensive findings on the evidence of needs ascertainment and program proposals (Initial Decision, 9 F.C.C. 2d at 354-477) and concluded in its own decision "that each of the applicants has met its obligations in this respect and that variations in the respective program proposals are merely minor differences in the proportions of time allocated for varying types of programs" (Pet. Appendix, p. 3a). Petitioners make no showing that the Commission was wrong in this conclusion, which was peculiarly a matter for Commission discretion.

Petitioners also claim that the Commission failed to state "satisfactory reasons" for preferring the prior broadcast experience of Flower City's owner-managers (Pet. Br., No. 532, pp. 19-21). The Commission stated that it preferred Flower City because of "the broad broadcasting, and particularly television, experience of G. Bennett Larson, and of the somewhat lesser broadcast experience of Gordon Auchincloss II" (Pet. Appendix, pp. 9a-10a). This was obviously a qualitative judgment, amply supported by the Commission's basic findings of fact concerning all the principals of the parties (Initial Decision, 9 F.C.C. 2d at 266-353), as the court of appeals found with certitude (Pet. Appendix, p. 34a, 36a & n.7). On such a matter of administrative expertise and discretion, the Commission was not required to specify the weight given to the various items of evidence or to disclose the mental operations by which its conclusions was reached.[15]

The Commission's explanation for the overall preference of Flower City (next after Federal) on the owner-manager integration factor has been referred to above. Its Decision

---

[15] National Labor Relations Board v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953); United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 529 (1946); Baltimore and Ohio Railroad Co. v. United States, 298 U.S. 349, 359 (1936); Scripps-Howard Radio, Inc. v. Federal Communications Commission, 89 U.S.App.D.C. 13, 16-17, 189 F.2d 677, 680-81, *cert. denied*, 342 U.S. 830 (1951).

also quite adequately explains why Federal was subordinated to other applicants because of its ownership of a radio station in the same city and why Community's past broadcast record superiority was not "so outstanding as to warrant substantial weight" (Pet. Appendix, pp. 13a-14a).

In summary, the Commission applied its policies and criteria to the facts in an entirely reasonable manner and complied meticulously with all applicable procedural requirements. Thus, its choice of fully-qualified Flower City as the winner of the comparative proceeding was clearly within the realm of the Commission's discretion (*Pinellas Broadcasting Co. v. Federal Communications Commission*, 97 U.S. App. D.C. 236, 230 F.2d 204, *cert. denied*, 350 U.S. 1007 (1956), and this case presents no important question of federal law which is not already fully settled.

CONCLUSION

For the foregoing reasons, the petitions for a writ for certiorari should be denied.

Respectfully submitted,

THOMAS N. DOWD
HAROLD DAVID COHEN
J. LAURENT SCHARFF
Pierson, Ball & Dowd
1000 Ring Building
Washington, D.C. 20036
Attorneys for Respondent Flower City Television Corporation

September 1969.

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U.S. 327 — 3

Associated Press v. *United States*, 326 U.S. 1 — 10

Baltimore & O. R. Co. v. *United States*, 298 U.S. 349 — 9

Colorado Radio Corp. v. *Federal Communications Commission*, 118 F. 2d 24 — 10

Federal Communications Commission v. *WOKO, Inc.*, 329 U.S. 223 — 9

Federal Trade Commission v. *Mary Carter Paint Co.*, 382 U.S. 46 — 9

Guinan v. *Federal Communications Commission*, 297 F. 2d 782 — 10

Johnston Broadcasting Co. v. *Federal Communications Commission*, 175 F. 2d 351 — 6, 7

United States v. *Storer Broadcasting Co.*, 351 U.S. 192 — 10

Statute:

Communications Act of 1934 — 2

Miscellaneous:

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 — 4, 6, 7, 10

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

No. 532

STAR TELEVISION, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 31a–50a)[1] is not yet reported. The decision and memoran-

[1] Unless otherwise noted, "Pet. App." references are to the appendix to the petition in No. 285, which is paginated identically with the appendix to the petition in No. 532, except for an additional statutory appendix.

364-373—69

dum opinion and order of the Federal Communications Commission (Pet. App. 1a–30a) are reported at 9 F.C.C. 2d 249 and 10 F.C.C. 2d 718.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1969 (Pet. App. 50a). Timely petitions for rehearing were denied on April 1, 1969 (Pet. App. 51a). The petition for a writ of certiorari in No. 285 was filed on June 26, 1969. The time for filing a petition for a writ of certiorari in No. 532 was successively extended by the Chief Justice and Mr. Justice Marshall to and including August 29, 1969, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and 28 U.S.C. (Supp. IV) 2350.

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly applied its comparative criteria to the ten remaining applicants for a television station license in Rochester, New York.

2. Whether the Commission abused its discretion by declining to consider the post-record attempt of one of the applicants to better its relative position by offering to dispose of its Rochester radio station.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix E of the petition in No. 285 (pp. 52a–53a) and in the petition in No. 532 (pp. 3–4).

STATEMENT

In 1961 twelve applicants, including all of the petitioners in No. 532 and the petitioner in No. 285 along with the intervenor below, Flower City Television Corporation, submitted applications to the Federal Communications Commission for construction permits to operate a third VHF television station in Rochester, New York, on Channel 13. The applications, being mutually exclusive, were designated for a comparative hearing to determine which applicant would better serve the public interest.[2] See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

After a lengthy evidentiary hearing the examiner issued an initial decision awarding the permit to a commercial operator and an educational association which had jointly proposed to operate Channel 13 on a share-time basis. However, after the filing of exceptions and supporting briefs and oral argument before the Commission, the joint applicants withdrew their applications.[3] In May 1965 the Commission remanded the case to an examiner for further hearing.

[2] Since September 15, 1962, all of the petitioners have combined to provide service over Channel 13 through a Commission-authorized interim corporation. This interim corporation continues to operate on Channel 13 as a result of the court of appeals' February 19, 1968, stay of the Commission's decision, which was continued in effect pending disposition of the instant petitions.

[3] The educational association then applied for authorization to operate, and is currently operating, a full-time UHF educational station in Rochester.

On July 28, 1965, before the contemplated further hearing was held, the Commission issued its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393, in which it set forth the factors and criteria which were to govern the selection of applicants in all future comparative station license proceedings.[4] In the light of this action, the Commission determined that the present case could be decided upon the existing record without the taking of further evidence by an examiner. None of the parties objected to the Commission's decision not to hold a further hearing. Additional oral argument was had before the Commission, after which it rendered the decision under review. It adopted the examiner's findings, made further findings, formed its own conclusions in light of the comparative criteria explored at the hearing, assessed the applicability and weight of each of the criteria as set out in its *Policy Statement,* and awarded the grant to Flower City.

The principal bases for the Commission's decision were the assurance of good performance that Flower City offers because of the extensive broadcast experience of two of its stockholders who are going to par-

[4] The general objectives of the Commission are to select as a licensee the applicant who will provide the best practicable service to the public and at the same time offer a maximum diffusion of control of the media of mass communications (1 F.C.C. 2d 394). These goals are measured against those factors traditionally applied in determining the grant of a station license to competing applicants, *viz*: (1) diversification of control of the media of mass communications, (2) extent of participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of the frequency and (6) character. The *Policy Statement* sets forth the manner in which each of the above factors will be evaluated.

ticipate in the full-time operation of the station, and the fact that the great majority of Flower City's stock is held by local residents, the majority of whom will devote some time to the operation of the station (Pet. App. 1a, 9 F.C.C. 2d 249; reconsideration denied, 10 F.C.C. 2d 718, Pet. App. 24a).

In assessing the ten remaining applicants, the Commission found that, aside from Flower City, only Community (one of the petitioners in No. 532) and Federal (the petitioner in No. 285) had significant characteristics warranting a preference on any score.[5] It preferred Flower City over Federal, however, because Federal's single stockholder was already connected with a radio station in Rochester and therefore Flower City would provide an entirely new viewpoint in the community (Pet. App. 13a). While the Commission found the past broadcast record of those associated with Community commendable, it also found this factor to be of reduced significance because it was attributable to one individual who was only a 15-percent stockholder in Community (Pet. App. 14a). It found that on balance this plus for Community did not warrant preferring Community over Flower City because of the latter's superiority on two other counts—broadcast experience and participation in the operation of the proposed station by its owners (Pet.

[5] The Commission found that Federal warranted a preference because it provided total integration of ownership and management (Pet. App. 9a), and that Community was entitled to a preference because of its 15-percent stockholder's relationship to the "commendable record of performance" compiled by station WHAM, with which he had previously been associated (Pet. App. 11a–12a).

App. 13a–14a).[6] Two commissioners dissented (Pet. App. 19a, 21a).

On appeal to the court below, petitioners charged the Commission with various errors, including failure to adhere to the guidelines of its *Policy Statement,* to give adequate reasons for its decision, and to consider Federal's post-record offer to sell its Rochester radio station.

The court of appeals tested the Commission's procedures and conclusion against the guidelines laid down in *Johnston Broadcasting Co.* v. *Federal Communications Commission,* 175 F. 2d 351 (C.A.D.C.). A majority of the court found the Commission's reasoning to be "clear and amply supported by findings of fact and by the evidence" (Pet. App. 34a). Judge Leventhal dissented, stating that in his view the Commission's findings failed to support its order and that it failed to set forth its reasons for preferring Flower to Community (Pet. App. 37a).

ARGUMENT

The selection on rational grounds of one seemingly qualified applicant over another in any particular comparative licensing proceeding is obviously a matter over which reasonable administrators and judges can differ. To minimize such differences the Commission has adopted for all future cases its *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393. Here it applied the policies there enunciated

[6] See also Pet. App. 25a–26a, where the Commission, in denying reconsideration, summarized the bases on which its selection of Flower City over Federal and Community had been grounded.

to the extensive and detailed findings of fact made by the examiner and independently determined to select Flower City instead of one of the other applicants to operate the new Rochester television channel. Petitioners raise no question as to the general validity of the criteria contained in the *Policy Statement*. Rather, their principal contentions (Pet. No. 532, pp. 12–22; Pet. No. 285, p. 23) are that in so choosing the Commission failed to provide the applicants and the reviewing court with sufficient findings and an adequate explanation of its reasons for preferring Flower City. The careful review of the court below demonstrates that the findings and explanations were adequate, that the guidelines were followed, and that the dispute presented by this record raises no general issue warranting review by this Court.

1. As both the majority and the dissenter pointed out in the court below, the Commission need not, as petitioners had suggested, "reach and state a comparison between each pair of applicants in respect to each criterion" expressed in its *Policy Statement* (Pet. App. 35a, 41a–42a). Instead its duty is to make "findings in respect to each applicant as to every point of comparison suggested by a party and then a composite consideration" (Pet. App. 35a). This accords with long-established precedent governing findings in comparative licensing proceedings. *Johnston Broadcasting Co.* v. *Federal Communications Commission, supra.*

In the instant case, the Commission's decision reflects a concise evaluation of the comparative criteria set forth in the *Policy Statement* in the light of the

examiner's 253 pages of findings of fact. Although in the court of appeals' words "[t]he case was enormously complicated and tedious" (Pet. App. 33a), it found that the Commission's findings and conclusions clearly indicated the reasons for its preference of Flower City over the other applicants. The Commission considered, and the court discussed, each pertinent factor, including broadcast experience, diversification of control of mass communication media, and owner participation in station management. The Commission could find no preference with respect to proposed program service,[7] but was able to make an assessment of past broadcast service and to determine among the three surviving applicants—Flower City, Federal and Community—a preference for Flower City over Community because of its superiority in participation in station operation, and a preference of Flower City over Federal because of the latter's existing Rochester station. These conclusions were, of course, supported by the examiner's detailed basic findings.

Both the Commission's decision and the court of appeals' review follow the guidelines set forth in this Court's rulings. *Federal Communications Commission*

[7] Petitioners' assertion that the Commission failed to consider the proposed programming of the applicants is contrary to fact; over 120 pages of findings (9 F.C.C. 2d 354, *et seq.*) were adopted by the Commission. Based on these findings, it concluded that none of the applicants warranted a programming preference (Pet. App. 10a). Moreover, in considering the respective applicants' programming it found "merely minor differences in the proportions of time allocated for varying types of programs" (Pet. App. 3a). All intended an affiliation with the ABC network (see Pet. No. 285, p. 4).

v. *WOKO, Inc.*, 329 U.S. 223, 228; *Baltimore & O.R. Co.* v. *United States*, 298 U.S. 349; *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U.S. 46, 48. While the court might, independently, have reached a different result, it properly recognized that it is not empowered to choose the grantee but only to assure, as it did, that the Commission properly performed its responsibilities.

2. All of the other applicants were given a substantial preference over the petitioner in No. 285, Federal, with respect to diversification of control of mass communication media; this resulted from Federal's ownership of radio station WSAY, Rochester, and the ownership by its 100-percent stockholder, Gordon P. Brown, of radio station WNIA, Cheektowaga, New York. As the licensee of these standard broadcast stations, Federal was found comparatively inferior to the other applicants with regard to this important factor. In order to improve its comparative standing Federal's counsel, at the second oral argument and some five years after its application was filed, made an oral promise that Federal would dispose of one of its two broadcast interests in the Rochester area. However "solemn," nothing was done to formalize this promise until after the appeal was taken to the court of appeals, following the Commission's grant to Flower City.[8] Such attempts on the part of applicants to improve weaknesses after the close of an administrative record have been consistent-

[8] A "petition to amend the record," was filed by Federal on March 12, 1968, over three months after the Commission's decision denying reconsideration of its earlier decision.

ly disallowed in the exercise of the agency's discretion to control the proceedings before it. *E.g., Guinan* v. *Federal Communications Commission,* 297 F. 2d 782 (C.A.D.C.); *Colorado Radio Corp.* v. *Federal Communications Commission,* 118 F. 2d 24 (C.A.D.C.)

3. Finally, petitioners' assertion that the importance of diversification was unknown until the Commission issued its 1965 *Policy Statement* is unfounded. Diversification of ownership has been a traditional consideration in comparative licensing proceedings and its importance is well established. *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192. See also *Associated Press* v. *United States,* 326 U.S. 1. Indeed, it was specifically considered at the hearing here, and the examiner made findings and conclusions with regard to this factor long before the *Policy Statement* was issued (9 F.C.C. 2d 528).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
HOWARD E. SHAPIRO,
Attorney.

HENRY GELLER,
General Counsel,
JOHN H. CONLIN,
Associate General Counsel,
LENORE G. EHRIG,
EDWARD J. KUHLMANN,
Counsel,
Federal Communications Commission.

SEPTEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 3 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND FLOWER CITY TELEVISION CORPORATION, *Respondents*.

REPLY BRIEF FOR PETITIONER

EDWARD J. GRENIER, JR.
1200 Farragut Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

SUTHERLAND, ASBILL & BRENNAN
1200 Farragut Building
Washington, D. C. 20006

October, 1969

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 285

THE FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION AND FLOWER CITY TELEVISION CORPORATION, *Respondents*.

REPLY BRIEF FOR PETITIONER

The points raised by respondents in their briefs in opposition are answered in the petition. However, some further comment is required because of several statements in the briefs of respondents.

1. The briefs in opposition accuse petitioner of undue dilatoriness in making its commitment to divest its Rochester radio station, and Flower City Television Corporation ("Flower City") cites certain provisions of the Commission's rules in support of its contention (Flower City Br., p. 10). What the briefs in opposi-

tion fail to recognize, however, is that petitioner, in making its commitment to divest during the 1967 oral argument before the Commission, was affirmatively following the particular procedure specified by the Commission in this particular case. As noted in the petition (pp. 7-8, 19-20), the Commission ordered the 1967 oral argument in order to permit the parties "to address themselves to the remaining issues in this proceeding," since "a number of events have occurred since that date [November 2, 1964, date of the first oral argument] which may have a bearing upon the determination to be made herein." The revisions brought about by the *Policy Statement on Comparative Broadcast Hearings,* 1 F.C.C. 2d 393 (1965), in the significance of the diversification criterion was plainly one of the "remaining issues" to be addressed. Under the circumstances, 47 C.F.R. §§ 1.513 and 1.522(b) are inapposite.*

2. Flower City (Br., p. 11) makes much of the fact that the Commission, in its order denying reconsideration of its final decision, rejected a petition for leave to amend filed by one of the applicants after the Commission's final decision. However, whatever the Commission might say in an order denying reconsideration

---

* Flower City's point that attorneys ordinarily may not sign applications or amendments to applications on behalf of applicants is inapposite for a further reason. Mr. Gordon P. Brown, president of petitioner, was personally present at the May, 1967, oral argument and personally directed the then counsel for petitioner to commit petitioner to dispose of its radio station.

On its face, Section 1.258 of the Commission's rules (47 C.F.R. § 1.258), cited by Flower City (Br., p. 10), is irrelevant. That section deals with the closing of a hearing record, and not with the supplementing of a hearing record after it has been formally closed.

in an attempt to rectify to the greatest extent possible any errors it may have made in giving weight to selected post-record changes while ignoring other equally significant post-record changes, the fact remains that the Commission could not have rendered the decision it did without having given decisional significance to certain post-record changes while failing and refusing to consider petitioner's commitment to dispose of its Rochester radio station. In particular, the Commission could not have ranked Star Television, Inc., equal to all of the other applicants except petitioner with respect to the diversification factor without relying upon certain post-record changes (Petition, p. 21). In any event, as noted above and as fully discussed in the petition, petitioner's statement at oral argument concerning the disposal of its Rochester radio station was not a mere attempt to improve its comparative position vis-a-vis the other applicants, as contended in the briefs in opposition, but rather was petitioner's response to the Commission's express invitation to address itself to the "remaining issues" in the proceeding, one of the most important of which was the change brought about by the *Policy Statement* in the preeminence of the diversification factor.

3. The Solicitor General misconstrues petitioner's position concerning the changes wrought by the *Policy Statement* in the significance of the diversification criterion (S. G. Br., p. 10). The petition shows on its face (pp. 17-18) that petitioner is well aware of the fact that the Commission considered diversification as one of the pertinent criteria in broadcast proceedings prior to the issuance of the *Policy Statement*. It is respectfully submitted that it is the Solicitor General, not the petitioner, who has misapprehended the

significance of the Commission's action taken in the *Policy Statement*. *Compare WHDH, Inc.*, 33 F.C.C. 449, 453 (1962), *with WHDH, Inc.*, 16 F.C.C. 2d 1, 12 (1969) (and see Petition, pp. 17-18 & n. 21).

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition, a writ of certiorari should issue, the decision below should be reversed summarily, and the case remanded with directions that the Commission reconsider its decision in light of petitioner's commitment to dispose of its existing broadcast interests.

Respectfully submitted,

EDWARD J. GRENIER, JR.
1200 Farragut Building
Washington, D. C. 20006
Counsel for Petitioner

Of Counsel:

SUTHERLAND, ASBILL & BRENNAN
1200 Farragut Building
Washington, D. C. 20006

October, 1969

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 15 1969
JOHN F. DAVIS, CLERK

No. 532

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION *and* FLOWER CITY TELEVISION CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

BENEDICT P. COTTONE
JOHN C. ELDRIDGE
1730 M Street, N.W.
Washington, D.C. 20036
Attorneys for Petitioners

Of Counsel:

FLY, SHUEBRUK, BLUME & GAGUINE
30 Rockefeller Plaza
New York, New York

WELCH & MORGAN
900 17th Street, N.W.
Washington, D.C.

WILNER, SCHEINER & GREELEY
1343 H Street, N.W.
Washington, D.C.

MULLIN & CONNOR
805 15th Street, N.W.
Washington, D.C.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 532

STAR TELEVISION, INC.; COMMUNITY BROADCASTING, INC.; CITIZENS TELEVISION CORP.; HERITAGE RADIO AND TELEVISION BROADCASTING CO., INC.; and MAIN BROADCASTING CO., INC., *Petitioners*

v.

THE FEDERAL COMMUNICATIONS COMMISSION *and* FLOWER CITY TELEVISION CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

For the reasons set forth in their Petition for a Writ of Certiorari, petitioners in No. 532 submit that this case involves important recurring questions of federal law warranting review by this Court. Respond-

ents' briefs in opposition have failed to demonstrate that this is not true or that certiorari should not be granted. Nevertheless, there are some errors and oversights in respondents' briefs in opposition which should be pointed out.

1. Respondent Flower City Television Corporation asserts that there were no differences within the court below as to the rationality of the Commission's comparative process and that the degree of difference between the majority opinion and Judge Leventhal's dissent is not a matter calling for review by this Court (Flower City's brief, pp. 12-13). However, a reading of Judge Leventhal's dissent makes it clear that he questioned the rationality of the Commission's comparative process (App. 47a-48a). In addition, the dissenting opinion specifically indicated that the Commission had failed to follow its *Policy Statement* (*e.g.*, App. 45a). Moreover, Judge Leventhal underscored the importance of the judiciary requiring the Commission to give findings and explanations, as it "promotes confidence that decisions are unbiased and not arbitrary" (App. 48a) and insures that agencies "are selecting those licensees who will best serve the public" (App. 49a). All in all, Judge Leventhal's dissenting opinion itself demonstrates that the case presents issues which merit consideration by this Court.

2. Respondent Flower City further states that "even a clear departure from the literal word of the *Policy Statement* would not necessarily constitute a change in basic policy" (Flower City's brief, p. 14) and that petitioners would "have the Commission give the *Policy Statement* a formulistic interpretation * * *" (Flower City's brief, p. 13). The respondent completely misunderstands the thrust of the petition for

certiorari in this case. Petitioners do not seek to require the Commission to apply the *Policy Statement* in a technical or formulistic manner. Nor would petitioners object to even a significant departure from the *Policy Statement* if explained by the Commission. What petitioners do object to, however, is what the Commission did here: a major departure from and substantial disregard of the *Policy Statement* by the Commission, without explanation and with the Commission at the same time purporting to apply the *Policy Statement*. This, as discussed in the Petition for a Writ of Certiorari, represents indefensible administrative action which, unfortunately, has been typical of FCC decisions over the years. Friendly, *The Federal Administrative Agencies: The Need For Better Definition of Standards,* 75 Harv. L. Rev. 1055, 1064 (1962).

3. Respondent Flower City argues that one aspect of the Commission's disregard of its *Policy Statement, i.e.,* with respect to proposed programming, was not raised before the Court of Appeals (Flower City's brief, p. 12). This assertion is in error. Repeatedly in the court of appeals, petitioners challenged the Commission's treatment of the issue of proposed programming (Appellants' brief in the court of appeals, pp. 48-55, 61-68; Petition for Rehearing of Star Television, Inc., pp. 3-13). And petitioners specifically claimed that the Commission violated its own *Policy Statement* in this regard (Appellants' brief in the court of appeals, p. 53).

4. Another error in respondent Flower City's brief in opposition is the contention that inaccurate figures were given in the petition concerning the ownership percentage of Community's and Main's full-time man-

agers as the figures allegedly "include stock owned by certain less-than-fulltime stockholders" (Brief, p. 14, fn. 12). However, the respondent overlooks a subsequent change in the status of Community's owner-managers which was noted by the Commission (App. 6a), and overlooks the fact that the full-time president of Main went from a twenty-five percent to a fifty percent stockholder as a result of his wife's death (Amendment submitted to the Commission by Main on October 30, 1967).

5. Finally, the respondents advance reasons for the Commission's decision which the Commission in its opinion did not give. For example, Flower City relies on the fact that one of its owner-managers was related to other persons owning 20.83 percent of Flower City's stock (Brief, p. 14). However, the Commission did not give this as a reason for preferring Flower City because of an alleged superiority under the criterion of full-time participation by owners. Flower City also states that the Commission judged that the experience of Flower City's owner-managers was *qualitatively* better (Brief, p. 16). This too does not appear in the Commission's decision. Regardless of any rationale for the Commission's decision put forward in the briefs in opposition, the fact is, as Judge Leventhal explained below, the Commission itself failed to explain or give a rational basis for its decision. Under well-settled principles of administrative law, such a decision should not stand.

CONCLUSION

For the reasons set forth in the Petition for a Writ of Certiorari, as well as the foregoing reasons, the petition should be granted.

Respectfully submitted,

BENEDICT P. COTTONE,
JOHN C. ELDRIDGE,
Attorneys for Petitioners

Of Counsel:

FLY, SHUEBRUK, BLUME & GAGUINE
WELCH & MORGAN
WILNER, SCHEINER & GREELEY
MULLIN & CONNOR

October 1969